No. 96-7151

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DEBRA FAYE LEWIS,
Petitioner,
v.
UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 16, 1996
CERTIORARI GRANTED MAY 12, 1997

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

Criminal No. CR94-20001-01; 02
18 U.S.C. §§ 7, 13 & 2
La. R.S. 14:30(5)

JUDGE TRIMBLE
MAGISTRATE JUDGE WILSON

UNITED STATES OF AMERICA

v.

JAMES M. LEWIS—01
DEBRA FAYE LEWIS—02

INDICTMENT

THE GRAND JURY CHARGES:

COUNT I

That on or about the 20th day of December, 1993, at Fort Polk, Louisiana, in the Western District of Louisiana, upon lands acquired for the use of the United States and under the exclusive jurisdiction thereof, JAMES M. LEWIS and DEBRA FAYE LEWIS, defendants herein, each knowingly and willfully aided and abetted, one by the other, did, with specific intent to inflict great bodily harm, commit first degree murder of Jadasha D. Lowery, a human being under the age of twelve years, in violation of Title 14, Louisiana Revised Statutes Annotated, Section 30(5), [amended 3-6-95 to 30A(5),] all in violation of

Title 18, United States Code, Sections 7, 13 and 2. (18 U.S.C. §§ 7, 13 & 2; La. R.S. 14:30(5) [amended 3-6-95 to 30A(5)]).

A TRUE BILL:

/s/ Roger Wiltz
Foreperson: Federal Grand Jury

MICHAEL D. SKINNER
United States Attorney

By: /s/ Larry J. Regan
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

(Title Omitted)

MOTION TO DISMISS INDICTMENT

NOW INTO COURT, through undersigned counsel, comes DEBRA FAYE LEWIS, who moves to dismiss the indictment filed against her on January 4, 1994 charging her with First Degree Murder of Jadasha D. Lowery in violation of Title 14 Louisiana Revised Statutes Annotated, Section 30(5) and in violation of Title 18 United States Code, Section 7, 13, and 2. [18 U.S.C. Section 7, 13, and 2; La. R.S. 14:30(5)].

1.

Mover, DEBRA FAYE LEWIS, alleges upon information and belief that the Federal indictment incorporates and adopts a violation of Louisiana law, LSA-R.S. 14:30(5), First Degree Murder, through the "Assimilative Crimes Act" of the United States Code, 18 U.S.C. Sections 7, 13, and 2, as a violation of Federal law.

2.

Mover, DEBRA FAYE LEWIS, alleges upon information and belief that the alleged crime for which she was charged occurred upon lands required for use of the United States under the exclusive jurisdiction thereof, to-wit: the alleged crime occurred on the military reservation at Fort Polk, Vernon Parish, Louisiana, within the Western District of Louisiana.

3.

Mover, DEBRA FAYE LEWIS, alleges upon information and belief that the United States Code specifically provides for the crime of First Degree Murder in Title 18 United States Code, Section 1111 (18 U.S.C. Section 1111) and that this section preempts all state law as it provides for and creates a crime which is committed upon lands acquired for the exclusive use of the United States and under the exclusive jurisdiction of the United States. The congressional intent in creating a specific federal crime for First Degre Murder indicates a desire to regulate and punish the action which defendant is alleged to have committed, thereby preempting the assimilation or adaptation of similar state crimes.

4.

Mover, DEBRA FAYE LEWIS, alleges upon information and belief that the indictment filed on January 4, 1994 is invalid and improper insofar as it charges her with First Degree Murder in violation of Louisiana Revised Statute LSA-R.S. 14:30(5) [LSA-R.S. 14:30(5)]. This criminal conduct was specifically preempted by Federal law. The Assimilative Crimes Statute, 18 U.S.C. Sections 7, 13, and 2, provides that only if there are no Federal criminal laws applicable to the alleged conduct may the United States incorporate through the Assimilative Crimes Act any State law regulating and punishing such conduct as its own. Insofar as there is a Federal law directly on point, the Assimilative Crimes Statute does not apply and the Louisiana State statute for First Degree Murder [LSA-R.S. 14:30(5)] does not apply and cannot be assimilated to charge mover with the crime of First Degree Murder pursuant to Louisiana law.

18 U.S.C., Section 13(a) reads as follows:

> "Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omis-

> sion which, *although not made punishable by any enactment of Congress*, would be punishable if commited or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and be subject to a like punishment."

5.

For the following reasons, defendant, DEBRA FAYE LEWIS, alleges that the indictment filed on January 4, 1994 is invalid and improper, and that the indictment charging her with commission of the crime of First Degree Murder pursuant to Louisiana law, LSA-R.S. 14:30(5), should be dismissed.

Respectfully submitted,

FRANK GRANGER
A Professional Law Corporation

/s/ Frank Granger
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203 West Clarence Street
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UNITED STATES DISTRICT COURT
W.D. LOUISIANA
LAKE CHARLES DIVISION

(Title Omitted)

April 6, 1994

MEMORANDUM RULING

TRIMBLE, District Judge.

Presently before the court are the defendants' motions to dismiss the indictment based upon the government's charging the defendants with a violation of state law under the Assimilative Crimes Act ("ACA"), instead of under 18 U.S.C. § 1111.

The ACA, 18 U.S.C. § 13, states (in pertinent part) that:

> "(a) Whoever within or upon any of the places now existing or hereinafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to like punishment."

In the instant case, the defendants, Debra and James Lewis, are charged with the first degre murder of their

tour year old child on Fort Polk Military Installation. The first degree charge stems from the use of LSA 14:30 (A)(5) through the ACA. R.S. 14:30(A)(5) states (in pertinent part) that:

> "(A) First degre murder is the killing of a human being:
>
> (5) When the offender has the specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve. . . ."

18 U.S.C. § 1111 states (in pertinent part) that murder is the killing of another human being with malice aforethought. Certain specifically enumerated aggravating factors constitute first degree murder; any other murder under this statute is murder in the second degree.

Because the state statute specifically refers to victims under twelve years of age, yet there is a federal statute that encompasses all murders, the defense argues that use of the ACA is not warranted and that the government is bound to proceed by charging the defendants with first degree murder under 18 U.S.C. 1111.

The Assimilative Crimes Act ("ACA"), 18 U.S.C. § 13, makes punishable the doing of acts on federal reservations which, "although not made punishable by Congress, would be punishable if committed or omitted" within the jurisdiction of the state in which the reservation is situated. Upon conviction of a violation under such an assimilated state law, the offender shall be subject to the punishment prescribed by the state. Read literally, any set of circumstances which constitutes a crime under state law, but not under federal law, could still be punished under state law in federal court through the ACA. The Supreme Court decision in *Williams v. United States*, 327 U.S. 711, 66 S.Ct. 778, 90 L.Ed. 962 (1946), and its progeny, indicated that this simplistic reading is not correct as will be discussed in more detail hereinafter.

The defendant in *Williams,* supra, was convicted of having carnal knowledge of an unmarried female over the age of 16 but under the age of 18 on a federal reservation in Arizona, in violation of Arizona law. It was not rape or assault with intent to rape under federal law because the required element of force was absent and the victim was over 16.

The Supreme Court held that Arizona law was not applicable under the ACA and that the defendant could not be punished thereunder for the following reasons:

> "We hold that the Assimilative Crimes Act does not make the Arizona statute applicable in the present case because (1) the precise acts upon which the conviction depends have been made penal by the laws of Congress defining adultery and (2) the offense known to Arizona as that of "statutory rape" has been defined and prohibited by the Federal Criminal Code, and is not to be redefined and enlarged by application to it of the Assimilative Crimes Act. The fact that the definition of this offense as enacted by Congress results in a narrower scope of the offense than that given to it by the State, does not mean that the Congressional definition must give way to the State definition. This is especially clear in the present case because the specified acts which would come within the additional scope given to the offense by the State through its postponement of the age of consent of the victim from 16 to 18 years of age, are completely covered by the federal crimes of adultery or fornication. (Footnotes eliminated)."

327 U.S. at 717-18, 66 S.Ct. at 781-782.

The Supreme Court ruled that the ACA should be interpreted as not allowing federal prosecution for state law violations where the exact act (intercourse, or intercourse with a minor) was already a criminal offense under federal law and only the definition or boundary definition or boundary condition differed in the state law. *Id.* at 717, 66 S.Ct. at 781. The Court emphasized that Congress had already considered the question of the proper age of consent for the federal crime of statutory rape, and had determined that it should be sixteen, as was reflected in the pertinent statute. *Id.,* 724-25, 66 S.Ct. at 784-85. The Court then reasoned that it would be using the state law to expand rather than to supplement the federal law to allow prosecution under a state law which more broadly defined and penalized the same offense. *Id.,* at 717, 66 S.Ct. at 781.

The defendant in *U.S. v. Eades,* 615 F.2d 617 (4th Cir.1980), who was charged with a variety of offenses, moved for dismissal of two counts based upon improper use of the ACA. The district court denied the motion and the defendant appealed.[1] The Fourth Circuit reversed the District Court and held that by enacting the comprehensive federal assault statute, Congress preempted the Maryland statute defining the crime of third degree sexual offense and that the ACA did not make the Maryland third degree sexual offense statute applicable to acts committed on a federal reservation. The Government moved for a rehearing *en banc,* which was *granted. U.S. v. Eades,* 633 F.2d 1075 (4th Cir.1980), cert. den. 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 203 (1981). Upon rehearing, the *en banc* court reversed the prior panel and held that the defendant's conviction for third degree sexual offense under the ACA was not proscribed by the federal statute, 18 U.S.C. § 113. The key factor that the court relied upon in reaching this conclusion was congressional intent. After examining federal law, the court

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[1] This appeal was consolidated with an appeal from a judgment convicting Larry F. Wilson of assault with intent to commit rape in violation of federal law and in violation of third degree sexual offense in violation of Maryland law.

found that Congress has considered sexual offenses in 18 U.S.C. § 2032 and 18 U.S.C. § 113 dealt entirely with assault.[2] The court reasoned that Congress did not intend to deal with sexual offenses in § 113, therefore the state statute could be assimilated because there was no relevant federal statute proscribing the specific conduct in which the defendant was engaged.

The Maryland statute under which both defendants in *Eades* were convicted proscribed as a "third degree sexual offense" sexual contact by one against the will and without the consent of another where the accused threatens or places the victim in fear of, *inter alia*, death, serious injury or kidnapping. Art. 27, § 461, Ann.Code of Md. (1976 Repl.Vol. and 1978 Cum.Supp.) defined "sexual contact" to include the intentional touching of the anal or genital area for the purposes of sexual arousal or gratification. The explicit elements of the offense of a "third degree sexual offense" as defined in the Maryland statute were not included verbatim in the federal assault statute. The government asserted that, because the federal statute did not proscribe the precise conduct proscribed by the state statute, the state law was applicable. The Court of Appeal in the *en banc* hearing agreed.

As in *Williams* and *Eades*, it could be argued that the federal staute in the case at bar, 18 U.S.C. § 1111 (murder of a human being), makes the "precise acts" upon which the conviction depends penal by the laws of Congress, the "precise act" arguably being the taking of another's life. It could also be argued that although the government concedes that the "precise act" of murder is congressionally proscribed in 18 U.S.C. § 1111, the federal statute does not address the compelling state interest

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[2] In § 113 there is only one reference to sexual assault in that assault with the intent to commit murder or rape is prohibited by § 113(a).

in the protection of children under the age of twelve. The Government asserts that Congress has not addressed the widespread and pervasive amount of child abuse which results in serious injury or death to children under the age of twelve and that the state statute addresses this issue in LSA R.S. 14:30(A)(5), with which the defendants in this case are charged.

The seriousness and compelling state interests involved in providing adequate criminal sanctions for child abuse notwithstanding, it appears at first glance that the facts of the case at bar are strikingly similar to the facts in *Williams*. The specific acts which would come within the additional scope given to the state offense by the State incorporating the element of murdering a child under the age of twelve is covered by the federal crime of murder, even though no victim age is delineated. The Louisiana statute merely incorporates a special form of murder . . . the murder of a child under the age of twelve. One cannot violate R.S. 14:30(A)(5) without violating some form of 18 U.S.C. § 1111. Yet, a further review of case law, including but not limited to the Fifth Circuit, brings this court to a different conclusion.

In *U.S. v. Bowers*, 660 F.2d 527 (5th Cir. 1981), a case of child abuse which resulted in the death of a two and a half year old, the applicable Georgia statute was applied through the Assimilative Crimes Act, although the court did not discuss the arguments which are now before the court. The Fifth Circuit affirmed the use of the ACA even though the issue of federal preemption was not discussed by the court at that time.

The case of *U.S. v. Brown*, 608 F.2d 551 (5th Cir. 1979), also involved injury to a child. The defendant in this case was charged under the ACA with having recklessly or with criminal negligence engaged in conduct causing serious injury to a child. The Fifth Circuit in this case held that although the acts with which the defendant was

charged could have been punished under the federal assault statute, the Government properly proceeded under the state child abuse statute under the ACA, as the "precise act" of injury to a child was not proscribed by federal law and the state statute was designed to punish specific conduct of a different character than that forbidden by the state statute.

The appellant in *Brown* relied on *Williams* and on *U.S. v. Butler,* 541 F.2d 730 (8th Cir.1976), to argue that the prosecution under the state child abuse statute must be barred because the conduct charged is punishable under the federal criminal assault provisions of 18 U.S.C. § 113. The Fifth Circuit held, however, that neither *Williams* nor *Butler* supported this contention because both of these cases dealt with attempts to enlarge the scope of a congressionally defined penal offense by the application of a "conflicting state definition" under the ACA.

In *Williams,* the Fifth Circuit reasoned that the federal law required a victim under the age of 16, whereas the state law allowed for a victim under 18. The defendant in *Williams* could not have been prosecuted under the federal law. The Supreme Court, then, set aside the conviction as an improper use of the ACA to expand a federal statute.

The defendant in *Butler* successfully overturned his state law conviction using the same reasoning as *Williams.* Although both the federal and state law proscribed the possession of a firearm by a felon, only the federal statute required interstate travel. The government lacked proof of interstate travel, therefore they proceeded under the state statute. Relying on *Williams,* the Eighth Circuit overturned Butler's conviction.

The ACA has been held to mean that prosecution for state crimes under the ACA may not occur when the "precise act" prohibited by the state law is defined and prohibited by the federal statute. *Williams,* supra; *U.S. v. Brown,* at 554; *U.S. v. Big Crow,* 523 F.2d 955 (8th Cir.

1975), cert. den. 424 U.S. 920, 96 S.Ct. 1126, 47 L.Ed. 2d 327; *U.S. v. Patmore,* 475 F.2d 752 (10th Cir.1973).

In the case now before the court, the acts with which the defendants are charged could be punishable under the federal murder statute, but the "precise act" of killing a child under the age of twelve is not murder in the first degree under federal law. *Brown,* at 554; see also *Fields v. U.S.,* 438 F.2d 205 (2d Cir.1971), cert. den. 403 U.S. 907, 91 S.Ct. 2214, 29 L.Ed.2d 684 The Lewises are being prosecuted in this case under a state statute designed to punish specific conduct of a different character than that proscribed in the federal murder statute. The state statute is specifically designed to provide a deterrent to child abuse, a subject which is not addressed by federal law.

Other circuits have followed this reasoning as well. A defendant who allegedly recklessly shot a fellow hunter on federal land was indicted in the Sixth Circuit for violating the Assimilative Crimes Act, based upon a violation of Tennessee law. *U.S. v. Griffith,* 864 F.2d 421 (6th Cir.1988), cert. den. 490 U.S. 1111, 109 S.Ct. 3167, 104 L.Ed.2d 1029. The district court dismissed the indictment, but the court of appeal reversed holding that the defendant could be properly prosecuted under the Tennessee assault statute, pursuant to the Assimilative Crimes Act, even though there was a federal statute. The federal statute in that case only punished assaults committed with specific intent. The state statute operated on essentially a different theory and also punished reckless assaults.

In *U.S. v. Chaussee,* 536 F.2d 637 (7th Cir.1976), the defendant was found guilty of aggravated battery on a government reservation. The defendant had stabbed another inmate of the U.S. Penitentiary at Marion without provocation. The appellant's position was that although the federal and state statutes were worded somewhat differently, both statutes covered the same type of crime and

thus, only the federal statute (with its lower penalty provision) was applicable.

Chaussee again involved the federal assault statute. The court reasoned that "assault" in the federal statute is a "more inclusive term" than "assault" as used in the state statute. The legislative history of 18 U.S.C. § 113 reveals that Congress used the term "assault" to including striking, beating and wounding which would otherwise be considered batteries under state law as distinguished from simple "assault" defined in 18 U.S.C. § 113(e) and therefore, the ACA was not properly used in this instance.[3]

The Sixth Circuit in *Griffith* examined the cases arising after *Williams* and grouped them into four principal categories:

> 1) cases in which all actions criminal under federal law are criminal under state law, but under state law additional acts are criminal as well [4];
>
> 2) cases in which the federal law encompasses a broader area than the state law and in which the state law usually carries greater penalties or ease of proof [5];

[3] The court stated that it was an established rule in the Seventh Circuit that "[w]here the government wrongly secures a conviction under the Assimilated Crimes Act, rather than under the relevant federal statute, the appropriate remedy is not a reversal of the conviction, but rather a vacating of the sentence and a remand to the district court for resentencing." *Id.*, at p. 645, citing *U.S. v. Word*, 519 F.2d 612, 618 (8th Cir. 1975).

[4] *U.S. v. Williams*, supra.

[5] *Shirley v. U.S.*, 554 F.2d 767, 768-769 (6th Cir.1977); (state law charge of armed robbery was a more specific and more harshly punished form of the federal crime of robbery; court held that where the federal crime "already occupied the field", the ACA could be used simply to enhance punishment or to facilitate conviction); *U.S. v. Big Crow*, 523 F.2d 955, 958 (8th Cir. 1975) (state law prohibited assault resulting in serious bodily injury; court held that federal assault statute applied even if less severe penalty attaches).

> 3) cases in which the state and federal laws overlap to a degree, but each occupies an area not covered by the other [6]; and
>
> 4) cases which involve the same pattern of laws as the preceding group, namely overlapping state and federal laws, but these acts fall into a disjunctive area where the acts constitute a crime under state law, but not under federal law [7].

The crux of the government's argument in the case at bar is that it is proceeding under the ACA because the state statute provides a theory essentially different from that in the federal statute, as in the third category of cases discussed above. The state statute embodies the compelling state interest in the protection of children under the age of twelve and in providing a deterrent against child abuse. The federal homicide statutes are silent in this regard.

The government asserts that Louisiana, by enacting R.S. 14:30(A)(5), has established a specially protected class of citizens, i.e., children under the age of twelve. Further, Louisiana has determined that if an individual, with specific intent to kill or to inflict bodily harm upon a victim less than twelve years of age, does so, then that action is egregious enough to classify it as first degree murder.

In support of its position, the government cited *United States v. Fesler*, 781 F.2d 384 (5th Cir.1986), cert. den.

[6] *Fields v. U.S.*, 438 F.2d 205 (2d Cir.1971), cert. den. 403 U.S. 907, 91 S.Ct. 2214, 29 L.Ed.2d 684 (1971) (the acts committed would have been a crime under the state malicious shooting statute or the federal assault statute, but the prosecution proceeded under state law through the ACA; court held use of ACA proper because the two statutes involved completely different theories of criminal conduct); See also *U.S. v. Brown*, 608 F.2d 551 (5th Cir.1979) (state child abuse statute better fit the facts of the case even though the case could have been prosecuted under the federal assault statute).

[7] *U.S. v. Griffith*, supra.

476 U.S. 1118, 106 S.Ct. 1977, 90 L.Ed.2d 661, in which the Fifth Circuit upheld the conviction of defendants charged with violating the Texas child abuse statute. The court reasons that "it is important that the state statute seeks to punish a particular offense at which the federal statute is not aimed, child abuse." 781 F.2d at 391.

Although the defendants' memoranda in support of their motions to dismiss seem to posit that the government would be required to prosecute the defendants for first degree murder under the federal statute if they are prosecuting for first degree murder under the state statute, this is not the case. 18 U.S.C. § 1111 requires specific intent to kill or malice aforethought for a conviction of first degree murder. The statute also lists certain aggravating factors which would classify certain other murders as "first degree". The statute states that all other murders are murders in the second degree. LSA R.S. 14:30(A)(1) requires specific intent to kill or to inflict great bodily harm. The state statute in R.S. 14:30(A)(5) also defines first degree murder, however, as the killing of a human being when the offender has specific intent to kill or inflict great bodily harm upon a victim under the age of twelve or sixty-five years of age or older.

Considering that the state statute seeks to punish child abuse, a particular offense at which the federal statute is not aimed and that the "precise act" constituting first degree murder under the state statute is different from the federal definition of first degree murder, this court holds that the use of the ACA is proper and the defendants' motions to dismiss will be denied.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

(Title Omitted)

NOTICE OF APPEAL

NOTICE is hereby given that DEBRA FAYE LEWIS, defendant in the above captioned and numbered matter, hereby appeals to the United States Court of Appeals for the Fifth Circuit from that judgment entered by the Honorable James T. Trimble, Jr., United States District Judge, on April 5, 1994, mailed on April 7, 1994 and received on April 14, 1994, denying the motion of the defendant to dismiss the indictment.

The defendant, DEBRA FAYE LEWIS, alleges that the denial of the Motion to Dismiss Indictment is erroneous and that an appeal to the United States Court of Appeals for the Fifth Circuit should be granted and that this matter be reversed and remanded for further proceedings.

Lake Charles, Calcasieu Parish, Louisiana, this 15th day of April, 1994.

By her Attorney,

FRANK GRANGER
A Professional Law Corporation

/s/ Frank Granger
FRANK GRANGER
203 West Clarence Street
Lake Charles, Louisiana 70601
(318) 439-2732

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40363

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DEBRA FAYE LEWIS and JAMES M. LEWIS,
Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Louisiana

Before KING, JOLLY and BENAVIDES, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellee to dismiss the appeal is GRANTED. Appeal DISMISSED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

HON. JAMES T. TRIMBLE, Judge Presiding

Case No. CR94-20001-01/02

UNITED STATES OF AMERICA

vs.

JAMES M. LEWIS and DEBRA FAYE LEWIS

MINUTES OF COURT

Date: March 6, 1995

A conference was held in Chambers. On motion of the Government, the indictment is ordered amended to add a capital A to the Louisiana Statute [14 Louisiana Revised Statutes Annotated, Section 30A(5)]

The Government moves to have the Court instruct the jury this is a non-death penalty case and the motion is GRANTED without objections.

Jury selection is discussed.

In response to an inquiry by Mr. Granger, the Court rules it will not sequester the jury at this time.

Case called for jury trial, 1st day.

The following jurors were selected and sworn to try the case:

(1) 77. Vernon E. Coles
(2) 17. Elda Marie Fulton
(3) 13. Tracy L. Morgan
(4) 6. Clifton L. Morris, Jr.
(5) 58. Johnny Lee Cormier
(6) 9. Rachel Cormie Barrow
(7) 21. Paula F. Mayo
(8) 71. Jimmie A. Guillot
(9) 1. L. J. Bass, Sr.
(10) 63. Joseph P. Crawford
(11) 27. Paulette B. Richards
(12) 28. Donald B. Dupre, Jr.
(Alt1) 44. Lena Mae Fruge
(Alt2) 29. Ronald E. Brisendine
(Alt3) 70. William C. Borkowski

Witnesses were sworn and sequestered. Opening statements were made by both sides. Testimony and evidence for the government were begun.

Trial will resume Tuesday, March 7, 1995 at 9:00 A.M.

Date: March 7, 1995

A hearing was held outside the presence of the jury to determine admissibility of photographic evidence. All spectators are removed from the courtroom. The court does not consider the photographs unnecessarily duplicative and will allow the photographs to be admitted.

Case called for trial by jury. 2nd day.

Testimony and evidence for the government continued.

Trial will resume Wednesday, March 8, 1995 at 9:00 A.M.

Date: March 8, 1995

Case called for trial by jury. 3rd day.

Testimony and evidence for the government continued.

Trial will resume Thursday, March 9, 1995 at 9:00 A.M.

Date: March 9, 1995

Case called for trial by jury. 4th day.

Testimony and evidence for the government continued.

A hearing is held outside the presence of the jury to determine the voluntariness of the statements given by the defendants. The Court advises the defendants of their rights. Witnesses called at the hearing are:

1. Gordon Devore
2. Harry Deal
3. Debra Faye Lewis

Mr. Singleton objects to advise of rights given to James M. Lewis and the objection is overruled.

The Court rules the statement given by James M. Lewis was given freely and voluntarily and adequate warning was given as to constitutional rights.

The Court rules Mrs. Lewis was adequately advised of her constitutional rights and her statements were made freely and voluntarily and pursuant to adequate advise of constitutional rights.

Mr. Regan informs the Court he was not provided with a copy of the psychiatrist report of the examination of

Debra Faye Lewis, pursuant to FRCrP 12.2. Mr. Granger states there is no report and he does not intend to use an insanity defense. Mr. Granger contends the motion and order for appointment of psychiatrist was adequate notice and the Government was provided a copy. The Court rules the motion and order served on the Government was adequate notice. The Court inquires if the Government has requested expert testimony? Counsel may present further arguments at 8:30 A.M. on Friday, March 10, 1995.

Trial will resume Friday, March 10, 1995 at 9:00 A.M.

Date: March 10, 1995

The Court amends its ruling (concerning the psychiatrist report of Debra Faye Lewis) in view of the notice requirement in FRCrP 12.2b to require Mr. Granger to state on the record what kind of defense he will rely on and Mr. Granger complies with the Court's instructions.

Counsel for the Government requests the Court give a 404.b limited instruction on similar acts. Mr. Singleton objects and the instruction is not given.

Case called for trial by jury. 5th day.

Testimony and evidence for the government concluded with the exception of calling one witness out of order on Monday morning.

Trial will resume Monday, March 13, 1995 at 9:00 A.M.

A jury charge conference is held.

Both defense counsel object to a "similar crimes" instruction to the jury and the Government wants the instruction included. The Court rules such instruction will not be given.

A supplemental charge conference will be held before the Court actually instructs the jury.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

(Title Omitted)

COURT'S INSTRUCTION TO THE JURY

You have now heard all of the evidence in the case as well as the final arguments of the lawyers for the parties.

It is my duty, therefore, to instruct you on the rules of law that you must follow and apply in arriving at your decision in the case.

In any jury trial there are, in effect, two judges. I am one of the judges; the other is the jury. It is my duty to preside over the trial and to determine what testimony and evidence is relevant under the law for your consideration. It is also my duty at the end of the trial to explain to you the rules of law that you must follow and apply in arriving at your verdict.

First, I will give you some general instructions which apply in every case, for example, instructions about burden of proof and how to judge the believability of witnesses. Then I will give you some specific rules of law about this particular case, and finally I will explain to you the procedures you should follow in your deliberations.

You, as jurors, are the judges of the facts. In determining what actually happened in this case—that is, in reaching your decision as to the facts—it is your sworn duty to follow all of the rules of law as I explain them to you.

You must follow all of my instructions as a whole. You have no right to disregard or give special attention to any

one instruction, or to question the wisdom or correctness of any rule I may state to you. That is, you must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I give it to you, regardless of the consequences.

By the same token it is also your duty to base your verdict solely upon the testimony and evidence in the case, without prejudice or sympathy. That was the promise you made and the oath you took before being accepted by the parties as jurors in this case, and they have the right to expect nothing less.

The defendants have been charged by the government with violations of federal law. The indictment is simply the description of the charge made by the government against the defendants; it is not evidence of their guilt. Indeed, each defendant is presumed by the law to be innocent. The law does not require a defendant to prove his innocence or produce any evidence at all and no inference whatever may be drawn from the election of the defendant not to testify. A defendant is presumed innocent throughout your deliberations until such time, if ever, you as a jury are satisfied that the government has proven him guilty beyond a reasonable doubt. The government has the burden of proving a defendant guilty beyond a reasonable doubt, and if it fails to do so, you must acquit the defendant.

Thus, while the government's burden of proof is a strict or heavy burden, it is not necessary that a defendant's guilt be proved beyond all possible doubt. It is only required that the government's proof exclude any "reasonable doubt" concerning the defendant's guilt.

A "reasonable doubt" is a doubt, based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing

to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced that the accused has been proved guilty beyond reasonable doubt, say so. If you are not convinced, say so.

As stated earlier it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

Also, during the course of a trial I occasionally make comments to the lawyers, or ask questions of a witness, or admonish a witness concerning the manner in which he should respond to the questions of counsel. Do not assume from anything I may have said that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.

So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

In considering the evidence, you may make deductions and reach conclusions which common sense and reasoning lead you to make; and you should not be concerned about whether the evidence is direct or circumstantial evidence. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantial evidence" is proof of a chain of facts and circumstances indicating either the guilt or innocence of the defendant. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It requires only that you weigh all of the evidence and be convinced of the defendant's guilt beyond a reasonable doubt before he can be convicted.

I remind you that it is your job to decide whether the government has proved the guilt of the defendant beyond a reasonable doubt. In doing so, you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to his or her testimony. An important part of your job will be making judgments about the testimony of the witnesses who testified in this case. You should decide whether you believe what each person had to say, and how important that testimony was. In making that decision I suggest that you ask yourself a few questions: Did the person impress you as honest? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness have any relationship with either the government or the defense? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of the other witnesses? These are a few of the considerations that will help you determine the accuracy of what each witness has said.

In making up your mind and reaching a verdict, do not make any decisions simply because there were more witnesses on one side than on the other. Do not reach a conclusion on a particular point just because there were more witnesses testifying for one side on that point. Your job is to think about the testimony of each witness you have heard and decide how much you believe of what each witness had to say.

During the trial you heard the testimony of individuals described as expert witnesses.

If scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify and state an opinion concerning such matters.

Merely because an expert witness has expressed an opinion does not mean, however, that you must accept this opinion. The same as with any other witness, it is only up to you to decide whether you believe this testimony and choose to rely on it. Part of that decision will depend on your judgment about whether the witness's background or training and experience is sufficient for the expert witness to give the expert testimony that you heard. You must also decide whether the witness's opinions were based on sound reasons, judgment, and information.

You must give separate consideration to the evidence as to each defendant.

In determining whether any statement, claimed to have been made by any defendant outside of court and after an alleged crime has been committed, was knowingly and voluntarily made, you should consider the evidence concerning such a statement with great care, and should give such weight to the statement as you feel it deserves under the circumstances.

You may consider in that regard such factors as the age, sex, training, education, occupation, and physical and

mental condition of the defendant, his or her treatment while under interrogation, and all the other circumstances in evidence surrounding the making of the statement.

Of course, any such statement should not be considered in any way whatsoever as evidence with respect to any other defendant on trial.

I caution you, members of the jury, that you are here to determine the guilt or innocence of each accused from the evidence in this case. You are here to decide whether the government has proved beyond a reasonable doubt that each defendant is guilty of the crimes with which he or she is charged. No defendant is on trial for any act or conduct or offense not alleged in the Indictment.

The indictment in this case charges that on or about the 20th day of December, 1993, at Fort Polk, Louisiana, in the Western District of Louisiana, upon lands acquired for the use of the United States and under the exclusive jurisdiction thereof, James M. Lewis and Debra Faye Lewis, defendants herein, each knowingly and wilfully aided and abetted, one by the other, did, with specific intent to inflict great bodily harm, commit first degree murder of Jadasha D. Lowery, a human being under the age of twelve years, in violation of Title 14, Louisiana Revised Statutes Annotated, Section 30(A)(5), all in violation of title 18, United States Code, Sections 7, 13, and 2.

First degree murder pursuant to Louisiana Revised Statute 14:30(A)(5) is the killing of a human being while the offender acted with specific intent to kill or to inflict great bodily harm and in addition: the victim is under the age of twelve.

Specific criminal intent is that state of mind which exists when the circumstances indicate that a defendant actively desired the prescribed criminal consequence to follow his act or failure to act.

Thus, in order to convict either of the defendants of First Degree Murder, you must find:

1. That said defendant killed Jadasha D. Lowery on or about December 20, 1993; and

2. That said defendant acted with specific intent to kill or inflict great bodily harm; and

3. The victim was under twelve years of age.

To convict either of the defendants of the offense charged, you must find beyond a reasonable doubt that the government proved every element of First Degree Murder.

If you are not convinced that a defendant is guilty of First Degree Murder, you may find that defendant guilty of a lesser offense, if you are convinced beyond a reasonable doubt that said defendant is guilty of a lesser offense.

The following are responsive lesser offenses:

1. Second Degree Murder

2. Manslaughter

Second degree murder is the killing of a human being (1) when the offender has a specific intent to kill or inflict great bodily harm.

Thus, in order to convict either of the defendants of second degree murder, you must find:

1. That said defendant killed Jadasha D. Lowery on or about December 20, 1993; and

2. That said defendant acted with specific intent to kill or inflict great bodily harm.

Manslaughter is a homicide which would be murder if it fit the definitions of first or second degree murder as set forth above, but the offense is committed in sudden heat of passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the

offender's blood had actually cooled, or that an average person's blood would have cooled, at the same time the offense was committed; OR

Manslaughter is the killing of a human being when the defendant is engaged in the perpetration or attempted perpetration of any felony or intentional misdemeanor directly affecting the person although there is no intent to kill or to inflict great bodily harm.

Thus, in order to convict either of the defendants of Manslaughter, you must find:

1. That said defendant killed Jadasha D. Lowery on or about December 20, 1993; and

2. That said defendant had specific intent to kill or inflict great bodily harm; and

3. That the killing was committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive the average person of his or her self-control and cool reflection.

OR

1. That said defendant killed Jadasha D. Lowery on or about December 20, 1993, whether or not he or she had intent to kill; and

2. That the killing took place while said defendant was engaged in the commission or attempted commission of any felony or intentional misdemeanor.

On such felony, Cruelty to Juveniles, is defined as the intentional or criminally negligent mistreatment or neglect, by anyone over the age of seventeen, of any child under the age of seventeen, whereby unjustifiable pain and suffering is caused to said child. Criminal negligence exists when, although neither specific nor general criminal intent is present, there is such disregard of the interest of others

that the offender's conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances.

We have just talked about what the government has to prove for you to convict a defendant of first degree murder. Your first task is to decide whether the government has proved, beyond a reasonable doubt, that a defendant committed the crime of first degree murder. If your verdict on that is guilty, you are finished with the Indictment as to that defendant. But if your verdict is not guilty, or if you are unable to reach a verdict, you should go on to consider whether the defendant is guilty of second degree murder or manslaughter, which are lesser included offenses of the indictment.

Of course, if the government has not proved beyond a reasonable doubt that a defendant committed first degree murder, second degree murder or manslaughter, your verdict must be not guilty.

The guilt of a defendant in a criminal case may be established without proof that the defendant personally did every act constituting the offense alleged. The law recognizes that, ordinarily, anything one can do for himself or herself may also be accomplished by that person through the direction of another person as his or her agent, or by acting in concert with, or under the direction of, another person or persons in a joint effort or enterprise.

So, if another person is acting under the direction of a defendant or if a defendant joins another person and performs acts with the intent to commit a crime, then the law holds that defendant responsible for the acts and the conduct of such other person just as though the defendant had committed the acts or engaged in the conduct.

Notice, however, that before any defendant may be held criminally responsible for the acts of another it is necessary that the accused deliberately associate himself or

herself in some way with the crime and participate in it with the intent to bring about the crime; and must have the specific intent to actively desire the prescribed criminal consequences, in this instance to inflict great bodily harm or to kill.

Of course, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.

In other words, you may not find a defendant guilty unless the government proves beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that said defendant voluntarily participated in its commission with the intent to violate the law.

If any defendant is found guilty, it will be my duty to decide what the punishment will be. You should not be concerned with punishment in any way. It should not enter your consideration or discussion.

The word "knowingly", as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident.

You may find that a defendant has knowledge of a fact if you find that the defendant deliberately closed his eyes to what would otherwise have been obvious to him. While knowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent, careless, or foolish, knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact.

The word "wilfully", as that term is used in these instructions, means that the act was committed voluntarily

and purposely, with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law.

You will note that the indictment charges that the offense was committed "on or about" a specified date. The Government does not have to prove that the crime charged was committed on that exact date, so long as the Government proves beyond a reasonable doubt that a defendant committed the offense on a date reasonably near the date alleged.

Any verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agrees to it. In other words, your verdict must be unanimous. Your deliberations will be secret. You will never have to explain your verdict to anyone.

It is your duty as jurors to consult with one another and to deliberate in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your mind if convinced that you were wrong. However, do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times, you are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case, to decide whether the government has proved each defendant guilty beyond a reasonable doubt.

Upon retiring to the jury room you should first select one of your number to act as your foreperson who will preside over your deliberations and will be your spokesperson here in court. A verdict form has been prepared for your convenience. [Explain the verdict form.]

You will take the verdict form to the jury room and when you have reached unanimous agreement as to your verdict, you will have your foreperson fill it in, date and sign it, and then return to the courtrom.

If, during your deliberations, you should desire to communicate with me, the foreperson should write your message or question, sign it, and pass the note to the court security officer who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should never reveal to any person, not even the court, how the jury stands, numerically or otherwise, on any count of the indictment, until after you have reached a unanimous verdict.

In deliberating on and arriving at a verdict, you should give this case the same careful and deliberate consideration you would give to any other serious and important matter in life, and the verdict you return should be one which completely satisfied your mind and conscience that to the very best of your ability you have interpreted the facts and have applied the law truly, correctly, and impartially.

Lake Charles, La.
March 14, 1995

/s/ James T. Trimble, Jr.
JAMES T. TRIMBLE, JR.
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

(Title Omited)

VERDICT FORM

1. As to the charge of first degree murder, we unanimously find that DEBRA FAYE LEWIS is

——— NOT GUILTY

—✔— GUILTY

If your verdict is NOT GUILTY, or you were unable to reach a verdict, please go to 1a below. If your verdict is GUILTY, you are finished. Sign and date the form.

1a. As to the lesser included offense of second degree murder, we unanimously find the defendant DEBRA FAYE LEWIS is

——— NOT GUILTY

——— GUILTY

If you considered the lesser included offense of second degree murder in 1a and your verdict was NOT GUILTY, or you were unable to reach a verdict, please go to 1b below. If the verdict as to second degree murder is GUILTY, you are finished. Sign and date the form.

1b. As to the lesser included offense of manslaughter, we unanimously find that DEBRA FAYE LEWIS is

——— NOT GUILTY

——— GUILTY

If you found the defendant guilty of manslaughter, go to the next question.

1c. Having found the defendant guilty of manslaughter, do you find that the defendant committed the offense upon a passion or in the heat of blood caused by provocation?

——— NO

——— YES

If you found that the defendant committed manslaughter in the heat of blood, the foreperson should sign and date the form. If the answer to 1c was NO, go to 1d.

1d. Having found the defendant guilty of manslaughter, did the defendant commit the offense during the commission of a felony or an intentional misdemeanor?

——— NO

——— YES

Lake Charles, Louisiana

March 14, 1995

/s/ Jimmie Guillot
Foreperson

(109)

JURY

CASE NUMBER: CR94-20001-01/02

DIVISION: Lake Charles

JUDGE PRESIDING: Trimble

EMPANELED: 03-06-95 RELEASED:

ONE	TWO	THREE	FOUR	FIVE	SIX	SEVEN
77. Vernon E. Coles 351	17. Elda Marie Fulton	13. Tracy L. Morgan	6. Clifton L. Morris, Sr.	58. Johnny Lee Cormier	9, Rachel Cormie Barrow	21, Paula F Mayo
Welsh 25 Mi	Welsh 30 Mi	Kinder 40 mi.	Cameron 65 Mi	Welsh 30 Mi	DeQuincy 40 Mi	L.C. 1 Mi

EIGHT	NINE	TEN	ELEVEN	TWELVE	1st ALTERNATE	2nd ALTERNATE
71. Jimmie A. Guillot J.A.-L.C.	1. L. J. Bass, sr.	62. Joseph P. Crawford	27. Paulette B. Richards	28. Donald B Dupre Jr	44. Lena Mae Fruge	29. Ronald E. Brisendine
L.C. 15 Mi	Pitkin 75 Mi	LC. 5 M.	Sulphur 20Mi	Sulphur 20Mi	Jennings 36 Mi	Sulphur 17 Mi

3rd Alternate
70. William

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

(Title Omitted)

MINUTES OF COURT

Date: August 22, 1995

X Case is called for sentencing.

Objections to the presentence report are ruled on by Written Memorandum Ruling.

In determining the particular sentence to be imposed, the court has considered the factors contained in 18 U.S.C. 3553.

Pursuant to the sentencing Reform Act of 1984, it is the judgment of the court that the defendant, DEBRA FAYE LEWIS, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for life on count I of the indictment. The defendant is to be given credit for time served.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of five (5) years. While on supervised release, the defendant shall not commit another federal, state or local crime; shall not illegally possess a controlled substance; shall not comply with the standard conditions that have been adopted by this court and shall comply with the following additional conditions:

1) Report in person to the probation office as directed.

2) Shall not possess a firearm, destructive device, or illegal substance.

3) Shall participate in substance abuse treatment and/or mental health counseling/treatment as directed by the U.S. Probation Office to include urinalysis, at the defendant's cost.

4) Shall maintain employment and shall perform a minimum of 200 hours of community service during the first 24 months of supervised release. While not employed, the defendant shall perform forty hours of community service per week as directed by Probation.

Upon beginning supervised release, the Probation Department shall supply the defendant with a written statement that sets forth the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

The court finds that the defendant does not have the ability to pay a fine.

The defendant is to pay the standard assessment of $50.00 on count I to the Crime Victim Fund immediately.

The defendant is advised by the court of her right to appeal.

The defendant is remanded to the custody of the U.S. Marshal to begin service of this sentence. The court recommends incarceration at a facility that meets the Bureau of Prison's security requirements that is nearest to Pensacola, Florida.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

(Title Omitted)

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

The defendant, DEBRA FAYE LEWIS, was represented by Frank Granger.

The defendant was found guilty on count(s) I of a one count indictment after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 7, 13 & 2 LA. R.S. 14:30(A)(5)	First Degree Murder	12/20/93	1

As pronounced on August 22, 1995, the defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $50.00, for count(s) I, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 22nd day of August, 1995.

/s/ James T. Trimble, Jr.
United States District Judge

Defendant's SSAN: 470-84-6936
Defendant's Date of Birth: 02/07/61
Defendant's address: 1400 East Ninth Avenue;
Florala, AL

Judgment Entered August 23, 1995

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of the defendant's life.

The defendant is to be given credit for time served.

The court recommends that the defendant be incarcerated at a facility that satisfies the Bureau of Prison's security recommendations, nearest to Pensacola, Florida.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. Report in person to the probation office as directed.
2. The defendant shall not own or possess a firearm, destructive device, or illegal substance.

3. The defendant shall participate in substance abuse and/or mental health counseling/treatment as directed by the U.S. Probation to include urinalysis, at the defendant's cost.

4. The defendant shall maintain employment and shall perform a minimum of 200 hours of community service during the first 24 months of supervised release. While not employed, the defendant shall perform 40 hours of community service per week as directed by Probation.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or per-

sonal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report except as noted in the attached Memorandum Ruling.

Guideline Range Determined by the Court:

Total Offense Level:	45
Criminal History Category:	1
Imprisonment Range:	life
Supervised Release Range:	3 to 5 years
Fine Range:	$25,000 to $1,000,000
Restitution:	$ n/a

The fine is waived or is below the guideline range because of the defendant's inability to pay.

The sentence is within the guideline range, that range exceeds 24 months, and the sentence imposed for the following reasons: Severity of offense.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

(Title Omitted)

MEMORANDUM RULING

Presently before the court are the defendant's, Debra Faye Lewis's objections to the presentence report which was prepared by the Probation Department.

In the first, second, and fourth objections the defendant objects to certain factual information which was contained in the presentence report, particularly the categorization of trial testimony. This court presided over the trial of this defendant and is very familiar with the testimony brought forth. The Presentence Report ("PSR") generally bears sufficient indicia of reliability to be considered as evidence by the court in resolving factual disputes. *U.S. v. Valencia*, 44 F.3d 269 (5th Cir.(La.) Jan. 26, 1995) (No. 94-40063). It is proper for the district court to rely upon the PSR's construction of evidence to resolve a factual dispute, rather than relying on the defendant's version of the facts. *U.S. v. Montoya-Ortiz*, 7 F.3d 1171 (5th Cir.(Tex.) Nov. 12, 1993) (No. 92-8204), citing *U.S. v. Robins*, 978 F.2d 881, 889 (5th Cir.(Tex.) Nov. 20, 1992) (No. 91-1850). Thus, the court, based upon its own recollection as well as the facts recited in the PSR, specifically adopts the facts as stated therein.

The third objection concerns the assignment of two additional points for a vulnerable victim. The defendant argues that such a victim related adjustment, U.S.S.G. § 3A1.1, is inappropriate because the Louisiana statute under which the defendants were charged required the victim to be under 12 years of age. The defendant is correct

that a condition that occurs as a necessary prerequisite to the commission of a crime cannot constitute an enhancing factor under the "vulnerable victim" enhancement provision of the sentencing guidelines; the vulnerability of that provision must be "unusual" vulnerability which is present only in some victims of that type of crime. *U.S. v. Moree*, 897 F.2d 1329 (5th Cir. (Miss.) March 29, 1990) (No. 89-4204); U.S.S.G. § 3A1.1; *U.S. v. Rowe*, 999 F.2d 14 (1st Cir. (Mass.) Jul 22, 1993) (No. 92-1959) (must show individual circumstances); *U.S. v. Morrill*, 984 F.2d 1136 (11th Cir. (Ga.) Feb 16, 1993) (No. 91-8386) (victim must possess unique characteristics which make him or her more vulnerable or susceptible); *U.S. v. Davis*, 967 F.2d 516 (11th Cir. (Ala.) Aug. 3, 1992) (No. 90-7108) (circumstance, as well as immutable characteristics, can render a victim unusually vulnerable). In *U.S. v. Peters*, 962 F.2d 1410, 1417 (9th Cir. (Cal.) Feb 7, 1992) (No. 91-50097, 91-50133), the court held that "vulnerability" includes not just age, but other characteristic of the victim, including the victim's reaction to the criminal conduct and the circumstances surrounding the act.

In the case at bar, to be prosecuted under the Louisiana state law, the victim had to be under age twelve. The vulnerability component of the Sentencing Guideline, however, incorporates more than mere age. This court agrees with Probation that the victim in this case was certainly vulnerable. The facts of the case show that the victim was left in the control of a step-mother who obviously was not fond of the little girl. Because the victim's father was in the military, the child was removed from other family members who may have noticed the signs of abuse, particularly the grandmother who was particularly close to the little girl. The pattern of abuse was repeated and the child had no way of escape. She was trapped in a situation with two people who she should have been able to trust, yet who systematic beat her to death. The defendant's own statement, although not produced in its entirety for the jury, indicated that she called the child out of her room repeatedly the night of her death so that her father could beat her. If any victim is "vulnerable" it was the four year old victim in this case. The defendant's objection is OVERRULED.

Lake Charles, Louisiana, this 22nd day of August, 1995.

/s/ James T. Trimble, Jr.
JAMES T. TRIMBLE, JR.
United States District Court

Conditions of Probation and Supervised Release

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

Docket No. 94-20001-01

Name James M. Lewis

Address 208 Oglesby Ave.
Crestview, FL 32536

Under the terms of your sentence, you have been placed on supervised release by the Honorable James T. Trimble, Jr., United States District Judge for the District of Western Louisiana. Your term of supervision is for a period of five (5) years, commencing upon release from incarceration.

While on supervised release, you shall not commit another Federal, state, or local crime and shall not illegally possess a controlled substance. Revocation of probation and supervised release is mandatory for possession of a controlled substance.

CHECK IF APPROPRIATE:

☐ As a condition of supervision, you are instructed to pay a fine in the amount of ————; it shall be paid in the following manner ————— .

☐ As a condition of supervision, you are instructed to pay restitution in the amount of ———; to ————; it shall be paid in the following manner ————— .

☒ The defendant shall not possess a firearm or destructive device. Probation must be revoked for possession of a firearm.

☒ The Defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

It is the order of the Court that you shall comply with the following conditions:

(1) You shall not leave the judicial district without permission of the court or probation officer;

(2) You shall report to the probation officer as directed by the court or probation officer, and shall submit a truthful and complete written report within the first five days of each month;

(3) You shall answer truthfully all inquires by the probation officer and follow the instructions of the probation officer;

[From the Certified Record (Transcript of Proceedings of March 27, 1987), pp. 3-11.]

[3] August 22, 1995

(PROCEEDINGS.)

THE COURT: All right. Court will come to order.

MR. REGAN: Good morning, Your Honor. In the matter of United States of America versus James Lewis, Docket Number 94-20001-01, and Debra Faye Lewis, 94-20001-02. The matter is before this court this morning for sentencing. Both defendants are present. Mr. Homer Singleton had represented James Lewis during the trial of this matter. However, he has withdrawn. Ms. Rebecca Hudsmith, the public defender for the western district of Louisiana now represents Mr. Lewis. And Mrs. Lewis is represented by Frank Granger, her counsel at trial. Would you all please come up. Do you want both at the same time, Your Honor?

THE COURT: Well, I guess we have to do them—well, I don't know. The offense is the same so I guess we could probably do them both together.

MR. REGAN: Would you all please come up?

MR. GRANGER: I had no objection to that.

THE COURT: Yeah.

MR. REGAN: Your Honor, also, for the purposes of the record, appearances this morning for the government will be myself and Mr. Michael D. Skinner, the U.S. [4] attorney.

MR. SKINNER: Good morning, Your Honor.

THE COURT: Good morning, Mr. Skinner. Glad to have you with us.

MR. SKINNER: Thank you.

THE COURT: All right. In the case of Mrs. Debra Faye Lewis, there was an objection, or there were objections filed which have been ruled on in a written memorandum ruling, copies of which have been given to counsel.

And the court will file the original in the record at this time. All right. Mr. Lewis, have you read the presentence report prepared by the probation office?

MR. LEWIS: Yes, sir.

THE COURT: And have you discussed it with your attorney, Ms. Hudsmith?

MR. LEWIS: Yes, sir.

THE COURT: Are you satisfied with the representation Ms. Hudsmith has furnished you in this matter?

MR. LEWIS: Yes, sir.

THE COURT: Mrs. Lewis, have you read the presentence report prepared by probation?

MRS. LEWIS: Yes, sir.

THE COURT: Have You discussed it with Mr. Granger?

[5] MRS. LEWIS: Yes, sir.

THE COURT: Are you satisfied with the representation Mr. Granger has furnished you in this matter?

MRS. LEWIS: Yes, sir.

THE COURT: All right. At this time, the court would recognize first Ms. Hudsmith and Mr. Lewis, if they have anything they would like to say before the court pronounces sentence?

Ms. HUDSMITH: Thank you, Your Honor. I will speak very briefly for Mr. Lewis, who on the advice of counsel will say nothing to the court at this time. He and I have reviewed the presentence report, recognizing that prior to the date that I was appointed, he was represented by Mr. Singleton, who also reviewed the report and noted for the record that there were no objections to it. I would simply state for the record that Mr. Lewis stands by his trial testimony at this time, and would say nothing further with regard to the facts of the case or the sentence. He understands, as I have explained to him, having gone over both the report and the federal sentencing guidelines that his case is one for which he faces a life sentence. And it is simply an unavoidable sentence the court must impose today. And he recognizes that and so with that in mind,

with that understanding, we would have nothing further to say at this time, Your Honor.

[6] THE COURT: All right. Mr. Granger, would either you or Mrs. Lewis like to say anything?

MR. GRANGER: I think she might want to make a brief comment or two.

MRS. LEWIS: I would just like to say that by me being so scared of Lewis, Matthew and Jadasha, I lost all four of my, I am going to lose all four of my children. I would just like to apologize to my children for being taken away from me, and say that I am sorry because I am not a murderer. I was negligent, but I am not a murderer. I would just like to say I am sorry.

MR. GRANGER: You Honor, with respect for Mrs. Lewis, Mrs. Lewis also stands by her trial testimony. When asked the question by Ms. Boutte whether she accepted responsibility, she said unequivocally, no, I did not do it. And there is nothing else we can say. She understands that under the sentencing guidelines she is going to get a life sentence, and for which you know she will exercise her right of appeal. So we are ready to proceed.

THE COURT: All right.

MS. HUDSMITH: You Honor, I don't know if it would be appropriate to say so at this time, but I have spoken with Mr. Lewis about the possibility of asking the court if he could, in sentencing him, recommend that he be placed in a prison as close as possible to his family who [7] are located in the Pensacola, Florida area. And I have reviewed with him the list of Federal prisons. It is not entirely clear to me which one he would be available to be placed in given the various levels of security.

THE COURT: Yeah.

MS. HUDSMITH: And that may be something that neither you or I are in a position to even attempt to figure out.

THE COURT: Well, I would have no problem recommending that he be placed, incarcerated at the facility nearest Pensacola that provide the necessary security.

MS. HUDSMITH: Thank you, Your Honor.

MR. GRANGER: Your Honor, the same thing for Mrs. Lewis. She is basically from the same area. I think they live thirty miles apart. She lived in Florala, Alabama, and he lived in Florida. That is the same area.

THE COURT: Pensacola.

MR. GRANGER: It is around that area, Your Honor. It is in the panhandle of Florida, in that small part of Alabama.

THE COURT: Sure.

MR. GRANGER: And she understands that it also depends on the security level where she has to go.

THE COURT: Okay. The sentences are exactly the same. So I will just say it one time. And it [8] will apply to both of them. Let me just say I know that both defendants maintained their innocence throughout the trial of this case. The jury heard all the testimony, viewed the exhibits and reached a unanimous verdict. I don't recall that, considering the seriousness of the charges, that they took an inordinate amount of time reaching their decision. And I don't know, I can't remember when I have been so moved in any case as when certainly the exhibits were introduced into evidence, and it was apparent from the photographs of the victim in this case, the type of treatment and suffering that she must have endured. And sentencing is never a pleasure for me. It is a duty that goes with the job. But as far as this court is concerned, there seems to be far too much emphasis in the media, and sometimes I feel in the profession of law itself, almost a total preoccupation with the rights of the defendants, and those who not only have been defendants, but who are convicted of offenses, and certainly their rights should be considered, and it is important in our system of justice that nobody who is innocent be convicted of an offense that they did not, in fact, commit. But I will say that a neglected element in the process are the victims. Certain victims are imposed on more than others, and the victim in this case, there is where my concern is. And I don't enjoy doing what I have to do.

But in view of what the defendants [9] in this case have been found guilty of, it is not particularly painful for me to pronounce the sentence that the court is directed to pronounce under the sentencing guidelines. This court, in determining a particular sentence to be imposed has considered the factors contained in 18 United States Code, section 3553. Pursuant to the Sentencing Reform Act of 1984, it is the judgment of this court that the defendant, James M. Lewis, and the defendant, Debra Faye Lewis be sentenced to be incarcerated for life on Count One of the indictment. Upon release from incarceration, both defendants shall be subject to supervised release for a term of five years. While on supervised release the defendants shall not commit another State, Federal or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court and shall comply with the following additional conditions. Report in person to the probation office as directed; shall not possess a firearm, destructive device or illegal substance; shall participate in substance abuse and/or mental health counseling and/or treatment as directed by the U.S. Probation Office at the defendant's cost; shall maintain employment and shall perform a minimum of two hundred hours of community service during the first twenty-four months of supervised release. While not employed, the defendant, each [10] defendant, shall perform forty hours of community service per week as directed by probation. Upon beginning supervised release the probation department shall supply each defendant with a written statement which sets forth the conditions to which the term of supervised release is subject and that is sufficiently clear and specific to serve as a guide for the defendant's conduct, and for such supervision as is required. Violation of the terms of supervised release may result in a recommitment in prison. The court finds that neither defendant has the ability to pay a fine, and no fine is assessed. Each defendant is to pay the standard

fifty dollar assesment to the Crime Victim Fund immediately. Each defendant is reminded that he or she may have the right to appeal. The court recommends that the defendants be incarcerated at a facility that satisfies the Bureau of Prisons security requirements nearest to Pensacola, Florida. Anything further?

MR. GRANGER: No, sir.

MS. HUDSMITH: No, sir.

THE COURT: All right. That's it. Court is adjourned until tomorow. Oh yeah, it is with the understanding that any time they have served in Federal custody to the extent it can benefit them, they will be given credit for that by the Bureau of Prisons. All right. It is ordered they be remanded to the custody of the marshal [11] now to begin service of their sentence. It is ordered they be remanded at this time to the custody of the marshal for transfer to the Bureau of Prisons for service of their sentence.

MR. REGAN: Thank you, Your Honor.

(Proceedings closed. Court adjourned.)

Condition of Probation and Supervised Release

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

—Docket No. 94-2001-02

Name Debra F. Lewis

Address 1400 E. 9th Avenue
Florala, AL 3644

Under the terms of your sentence, you have been placed on supervised release by the Honorable James T. Trimble, Jr., United States District Judge for the District of Western Louisiana. Your term of supervision is for a period of five (5) years commencing upon release from incarceration.

While on supervised release, you shall not commit another Federal, state, or local crime and shall not illegally possess a controlled substance. Revocation of probation and supervised release is mandatory for possession of a controlled substance.

CHECK IF APPROPRIATE:

☐ As a condition of supervision, you are instructed to pay a fine in the amount of ————; it shall be paid in the following manner ————————————.

☐ As a condition of supervision, you are instructed to pay restitution in the amount of ——— to ————; it shall be paid in the following manner ————.

☒ The defendant shall not possess a firearm or destructive device. Probation must be revoked for possession of a firearm.

☒ The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

It is the order of the Court that you shall comply with the following standard conditions:

(1) You shall not leave the judicial district without permission of the court or probation officer;

(2) You shall report to the probation officer as directed by the court or probation officer, and shall submit a truthful and complete written report within the first five days of each month;

(3) You shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

(Title Omitted)

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that DEBRA FAYE LEWIS, defendant herein, hereby appeals to the United States Court of Appeal for the Fifth Circuit from the judgment of the District Court rendered on August 22, 1995.

Lake Charles, Calcasieu Parish, Louisiana, this 25th day of August, 1995.

Respectfully submitted,

FRANK GRANGER
A Professional Law Corporation

/s/ Frank Granger
FRANK GRANGER,
LSBA No. 06219
203 West Clarence Street
Lake Charles, Louisiana, 70601
(318) 439-2732

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-30860

D.C. Docket No. 94-CR-20001-01

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DEBRA FAYE LEWIS,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana

Before JOLLY, DUHÉ, and STEWART, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the conviction and sentence of the district court in this cause is affirmed.

As Mandate: Sep. 24, 1996

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 95-30860

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES M. LEWIS; DEBRA FAYE LEWIS,
Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Louisiana

Aug. 19, 1996

Rehearing and Suggestion for Rehearing
En Banc Denied Sept. 16, 1996

Before JOLLY, DUHÉ, and STEWART, Circuit Judges.

STEWART, Circuit Judge:

James M. Lewis and Debra Faye Lewis appeal their convictions for first degree murder under Louisiana law pursuant to the Assimilative Crimes Act. Because the federal murder statute and sentencing guidelines occupy the area of the law, they contend that the district court erred in refusing to dismiss their indictments. They also

challenge the sufficiency of the evidence as well as evidentiary rulings made by the district court. Additionally, Debra Lewis argues that Battered Women's Syndrome diminished her capacity to form a specific intent to kill or inflict great bodily harm or to aid and abet James Lewis. For the following reasons, we reverse the district court's ruling regarding the indictments but affirm the defendants' convictions and sentences.

FACTS

James Lewis and his wife, Debra Lewis, were arrested for the beating death of four-year-old Jadasha D. Lowery, the biological daughter of James Lewis and Stacy Lowery. The death occurred on the military reservation at Fort Polk in Vernon Parish, Louisiana, where Mr. Lewis was stationed with the United States Army.[1]

On the day of her death, Jadasha was subjected to severe beatings, which resulted in several contusions and bruises on her scalp and which caused massive bruising over her entire body. The body bruises caused hemorrhages beneath the skin that redirected one-third to two-thirds of her entire blood volume from her circulatory system and into the tissues surounding the injuries. The head injuries caused Jadasha to suffer cerebral edema,[2] which was identified as the cause of her death. The indictment charged the Lewises with first degree murder under Louisiana law through the Assimilative Crimes Act.[3] After receiving guilty verdicts, both Lewises were sentenced to life imprisonment. The Lewises appealed.

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[1] Fort Polk, a United States military reservation, is a federal enclave as defined in 18 U.S.C. § 7.

[2] Cerebral edema is a condition in which the brain swells and presses on the brain stem and which eventually causes respiratory function to cease.

[3] The indictment provides as follows:

> That on or about the 20th day of December, 1993, at Fort Polk, Louisiana, in the Western District of Louisiana, upon lands

DISCUSSION

A. ASSIMILATIVE CRIMES ACT.

The Lewises argue that the indictment under which they were charged is defective because it improperly charges them under La.Rev.Stat. 14:30A(5) when 18 U.S.C. § 1111 criminalizes the same conduct. Mr. Lewis aserts that first degree murder of a person under the age of twelve under the Louisiana statute is comparable to second degree murder under section 1111, with the minor age of the victim causing punishment to be enhanced under the sentencing guidelines. Mrs. Lewis contends that the government was statute "shopping" when it charged them under Louisana law in order to obtain a lesser standard of proof and the benefit of more severe penalties in the event the jury returned verdicts on lesser included offenses.

Our examination of the Lewises' indictment requires us to analyze Assimilative Crimes Act. Interpretations of statutes receive de novo review. *Estate of Moore v. C.I.R.*, 53 F.3d 712, 714 (5th Cir.1995), Similarly, review of a district court's conclusion that an indictment is sufficient is reviewed under the de novo standard. *United States v. Green*, 964 F.2d 365, 372 (5th Cir.1992), *cert. denied*, 506 U.S. 1055, 113 S.Ct. 984, 122 L.Ed.2d 137 (1993). After evaluating the language of the ACA, Supreme Court precedent, and other federal jurisprudence,

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acquired for the use of the United States and under the exclusive jurisdiction thereof, JAMES M. LEWIS and DEBRA FAYE LEWIS, defendants herein, each knowingly and willfully aided and abetted, one by the other, did, with specific intent to inflict great bodily harm, commit first degree murder of Jadasha D. Lowery, a human being under the age of twelve years, in violation of Title 14 Louisiana Revised Statutes Annotated, Section 30(5), [Amended March 6, 1996 to 30(A)(5)], all in violation of Title 18, United States Code, Sections 7, 13, and 2. [18 U.S.C. §§ 7, 13, & 2; La. R.S. 14:30(5)].

we are compelled to conclude that the Lewises' indictment is invalid.

The ACA makes punishable crimes occurring on federal enclaves although Congress has not expressly addressed the conduct in the federal statutes. The ACA provides:

> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the state . . . in which such place is situated, by the laws thereof in force at the time of such act or ommission, shall be guilty of a like offense and subject to like punishment.

18 U.S.C. § 13. Through the ACA the government may use state statutes to prosecute offenders on federal enclaves "only if no act of Congress directly makes the offender's conduct punishable." *United States v. Brown*, 608 F.2d 551, 553 (5th Cir.1986). The ACA fills in gaps existing in federal statutes regarding criminal law. *Id.* However, where Congress has enacted legislation criminalizing conduct on the enclaves, the federal statutes preempt the state laws regarding those crimes. *United States v. Sharpnack*, 355 U.S. 286, 291, 78 S.Ct. 291, 294-95, 2 L.Ed.2d 282 (1958).

The Supreme Court shed light on the limitations of the ACA in *Williams v. United States*, 327 U.S. 711, 66 S.Ct. 778, 90 L.Ed. 962 (1946). In *Williams*, the Court reversed the conviction of a white married man convicted under the Arizona statutory rape law pursuant to the ACA for having sex wilth a seventeen-year-old Indian girl on an Indian reservation. 327 U.S. at 725, 66 S.Ct. at 785. The federal statutes punished carnal knowledge of a minor girl when the victim was under the age of

sixteen, whereas the Arizona statute punished the same conduct when the victim was under the age of eighteen. The Arizona statute provided a harsher penalty than the federal statute. *Id.* at 717, 66 S.Ct. at 781. Interpreting the language existing in the ACA at the time, the Court concluded that the precise acts of the defendant were made criminal under federal statutes addressing adultery or fornication as well as carnal knowledge, and the government could not enlarge the definiton of the federal carnal knowledge crime by incorporating the state statutory rape statute through the ACA. *Id.* at 717-18, 66 S.Ct. at 781-82. The Court further noted that the ACA "has a natural place to fill through its supplementation of the Federal Criminal Code, without giving it the added effect of modifying or repealing existing provisions of the Federal Code." *Id.* at 718, 66 S.Ct. at 782. The language of the ACA referred "in a generic sense" to "acts of a general type or kind." *Id.* at 722, 66 S.Ct. at 784. The Court held that in Williams' case "not only has the generic act been covered by the [federal] definition of having carnal knowledge, but the specific acts have been made 'penal' by the [federal] definition of adultery." *Id.* at 723, 66 S.Ct. at 784.

This court, like the majority of the other circuits,[4] has interpreted *Williams* as establishing a "precise acts" test

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[4] The circuit split following *Williams* is well recognized. *See, e.g., United States v. Broadnax*, 688 F.Supp. 1080, 1081-82 (E.D.Va. 1988); and *United States v. Smith*, 614 F.Supp. 454, 460 (D.Me. 1985), *vacated in part on other grounds, United States v. Mariea*, 795 F.2d 1094 (1st Cir.1986). The majority view holds that the ACA does not apply when the "precise act" prohibited by the state statute is defined and prohibited by the federal statute. *See generally, United States v. Johnson*, 967 F.2d 1431 (10th Cir.1992), *cert. denied*, 506 U.S. 1082, 113 S.Ct. 1053, 122 L.Ed.2d 360 (1993); *United States v. Sasnett*, 925 F.2d 392 (11th Cir.1991); *United States v. Griffith*, 864 F.2d 421 (6th Cir.1988), *cert. denied*, 490 U.S. 1111, 109 S.Ct. 3167, 104 L.Ed.2d 1029 (1989); *United States v. Kaufman*, 862 F.2d 236 (9th Cir.1988); and *Fields v. United States*, 438 F.2d 205 (2d Cir.), *cert. denied*, 403 U.S. 907, 91 S.Ct. 2214, 29 L.Ed.2d 684 (1971). *Compare* the minority view holding that the ACA does not apply when the federal statute punishes the "generic conduct" covered in the statute. *United States v. Butler*, 541 F.2d 730 (8th Cir.1976).

regarding the applicability of the ACA. *See United States v. Brown*, 608 F.2d 551, 554 (5th Cir.1979). In *Brown*, the court held that the government could prosecute the defendant under the Texas child abuse statute even though injury to a child could be punishable under the federal assault statute because the precise act of injury to a child was not proscribed by federal law and the state statute was designed to punish specific conduct of a different character than the conduct proscribed by the federal assault statute. Mrs. Brown was charged with injuring her husband's biological two-year-old son, whom she struck on the head with a blunt, flat instrument. Though surgery revealed a subdural hematoma covering the left side of his brain, the child survived. The court in *Brown* rejected arguments that use of the child abuse statute enlarged the scope of the federal offense. It found the child abuse and assault statutes different because of the nature of the offense being punished. The court relied on the Second Circuit case, *Fields v. United States*, 438 F.2d 205 (2d Cir.1971), to demonstrate that child abuse is a different type of assault than the conduct covered under the federal assault statute.

Similarly, in *United States v. Fesler*, 781 F.2d 384, 391 (5th Cir.1986), the court clarified that the federal statute and the state statute must involve different elements and must seek to punish different conduct. In *Fesler*, the Feslers were charged with murder under the federal statute and causing serious bodily injury under the Texas child abuse statute for the scalding death of their ten-month-old daughter whom they deliberately dipped in scalding water. The defendants alleged that the indictment violated the ACA. The court held that because the statutes covered

different "precise acts," no violation had occurred. *Id.* at 391. The court noted that death of a human being, essential for the manslaughter conviction, was unnecessary for the child abuse conviction. The court further explained that "[i]t is important that the state statute seeks to punish a particular offense at which the federal statute is not aimed, child abuse." *Id.* Accordingly, the court upheld application of the ACA in this context.

This court consistently has found that child abuse constitutes a different "precise act" which the government may charge in addition to murder under the federal statute. *See United States v. Webb*, 796 F.2d 60, 62 (5th Cir. 1986), *cert. denied*, 479 U.S. 1038, 107 S.Ct. 894, 93 L.Ed.2d 846 (1987) (convicted of second degree murder under the federal statute and injury to a child under the state statute for the death of a six-year-old boy whose head was slammed against a wall and who was scalded). Federal jurisprudence demonstrates that the different nature of the "act" regarding child abuse does not eliminate the need for seeking punishment for murder under the federal statute when the abuse results in death. *See United States v. Phillip*, 948 F.2d 241, 245 (6th Cir.1991), *cert. denied*, 504 U.S. 930, 112 S.Ct. 1994, 118 L.Ed.2d 590 (1992) (the defendant was charged with second degree murder under the federal statute and committing and permitting child abuse under the Kentucky child abuse statute); and *United States v. Harris*, 661 F.2d 138, 139 (10th Cir. 1981) (the defendant was charged with murder under the federal statute and the Wyoming child abuse statute). Indeed, where conviction under the state statute was allowed, the state child abuse statute was alleged in addition to murder under the federal statute, rather than in place of it.

Herein lies the distinction between the present case and *Brown* and *Fesler*. The government in the present case has entirely usurped the federal murder statute with "gap-filling" state law. The government uses the precise acts test as reasoned in *Brown* and *Fesler* to argue that it may use

the state murder statute although the federal statute already punishes murder. We find that the precise acts test cannot save this indictment.

The "precise act" sought to be punished under 18 U.S.C. § 1111 and La.Rev.Stat. § 14:30A(5) for murder of a victim under twelve [5] is the intentional killing of a human being (i.e., "murder"). This is the conduct clearly identified in both statutes. Murder is punishable under both the state and federal statutes though they define and punish the conduct differently. Section 1111 provides the following definition of murder: "Murder is the unlawful killing of a human being with malice aforethought." The section then delineates the elements needed for first degree murder and second degree murder:

> Every murder perpetrated by [1] poison, [2] lying in wait, or [3] any other kind of willful, deliberate, malicious, and premeditated killing; or [4] committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or [5] perpetrated from premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.
>
> Any other murder is murder in the second degree.

Section 14:30A(5) of the Louisiana Revised Statutes in pertinent part provides:

> A. First degree murder is the killing of a human being.
>
> . . . .
>
> (5) When the offender has specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve or sixty-five years of age or older.

The varying definitions affect the degree of the crime and the level of punishment. "Murder of a child" does not

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[5] Hereinafter we refer to the crime of "murder of a victim under twelve" as "murder of a child" or "child murder."

constitute a different act of murder omitted from the federal murder statute. That Louisiana chose to define first degree murder regarding children differently than Congress defines it does not automatically make murdering a child a different or even a more specific act.

The government attempts to show that the state's concern for child abuse prompted the specific reference to "victims under the age of twelve" in the first degree murder statute. We conclude that the government exaggerates the significance of the inclusion of the child murder provision in the child abuse reasoning set forth in *Brown* and *Fesler*. The Louisiana legislature placed child murder in the first degree murder statute to deter crimes against these vulnerable members of society and to ensure that if a child is murdered the offender is guaranteed to receive a certain sentence.[6] This reasoning explains the placement of all acts listed in the Louisiana first degree murder provision as well as the reasoning underlying the enumerated crimes qualifying for first degree murder under the federal statute. The lists in both statutes define what raises a particular homicide to the grade of first degree murder under the respective systems. We reject the position taken by the government during oral argument that it used the Louisiana statute to "further define" the federal law. Further defining would create a more expansive definition of federal murder. Accordingly, to treat the murder of a child as conduct of a different nature would impermissibly enlarge the scope of the federal statute, which the Supreme Court in *Williams* instructed that we cannot do. We can-

[6] Though not reflected in the murder statute, Congress addresses the vulnerability concern in the sentencing guidelines. Section 3A1.1 of the Federal Sentencing guidelines allows a judge to increase a defendant's sentence by two levels when the victim was a child. Section 3A1.1 provides: "If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age . . . or that the victim was otherwise particularly susceptible to the criminal conduct, increase by 2 levels."

not permit the government to create the illusion of a "gap" in the law where none exists in order to enhance its ability to convict or to exact a harsher penalty.

Further, contrary to the government's suggestion, public concern regarding child abuse does not change the character of murder when a child is involved. The distinction we have recognized between assault under the federal statute and child abuse cannot transfer by analogy to create a tangible distinction between murdering an adult and murdering a child. Child abuse qualifies as a separate class of conduct because the nature of the crime spawns methods and treatments not needed in a general assault case. This is not necessarily true regarding the murder of a child. Children are murdered in many ways unrelated to child abuse. For example, if a child is shot during a robbery on a federal enclave, this conduct constitutes murder plain and simple, and this offense would not be different in natuure so as to warrant invocation of the ACA. It would be illogical to say that child murders resulting from child abuse can be charged under the state statute pursuant to the ACA whereas all other child murders must be prosecuted under the federal statute. We find that the murder of a child is not a different degree of homicide that removes it from the federal murder statute.[7]

The government's interpretation of *Brown* and the precise acts test goes too far. Its interpretation would allow the wholesale incorporation of state law via the ACA. Neither Congress nor the Supreme Court intended such a result. For ACA purposes, a precise act cannot qualify as a "specific conduct of a different character" when the conduct is covered by a federal statute and when the acts

[7] Our decision might be different if the government were prosecuting the Lewises under a Louisiana murder statute that expressly made criminal child murders resulting from child abuse. This would make the precise act criminalized under the state statute qualify as being conduct of a different nature or character.

described in the federal and state statutes differ only in name, definition, or punishment.[8] The essential nature or theory of an act made criminal by a state statute must differ substantially from the federal statute in order to elevate the conduct to a precise act.

For example, "driving under the influence manslaughter" is conduct substantially different in nature than general "manslaughter." *See United States v. Sasnett*, 925 F.2d 392 (11th Cir.1991). The theory underlying DUI manslaughter is to remove the need to prove that the drinking caused an accident. *Id.* at 396. The government need only prove that the defendant had a blood alcohol level of .10 or higher. The court in *Sasnett* allowed application of the ACA because no federal statute defined or prohibited this precise act. *See also, United States v. Jones*, 244 F.Supp. 181, 183 (S.D.N.Y.1965) (allowing application of the ACA to prosecute using the "different

[8] We note in passing that the Sixth Circuit persuasively has identified four categories of cases that arise under ACA cases: (1) all crimes criminal under the federal law are also criminal under state law, but additional conduct is criminal under state law, (2) federal law encompasses a broader area than the state law, but the state law carries harsher penalties or an easier burden of proof, (3) state and federal laws overlap to a degree, but each occupies an area of law not covered by the other, and the conduct at issue falls within the overlapped area, and (4) the laws overlap, as described in the third group; however, the conduct falls within the area in which the act is criminal under the state law but not the federal law. *See United States v. Griffith*, 864 F.2d 421, 423-24 (6th Cir.1988). The district court in the present case found that this case falls within the third category because murder of a child could be punishable as federal murder, but the Louisiana statute presents a theory essentially different from that federal statute by taking into account the compelling state interest in protecting children under the age of twelve. We disagree. We find that this case falls within the second category. The Lewises' precise conduct is prohibited by the federal statute, but the penalty is harsher under the Louisiana statute. Murder of a child carries an automatic penalty of life or death in Louisiana. As explained above, the theories underlying the two statutes are not different.

theory" of disorderly conduct under the state statute rather than the federal parading/picketing statute where the defendants chained themselves to the court entrances to prevent entry or exit).

Murder of a child as defined under the Louisiana first degree murder statute cannot clear the "substantially different" hurdle. *See Shirley v. United States*, 554 F.2d 767, 768-69 (6th Cir.1977) (ACA inapplicable though armed robbery under the state statute was more specific and more harshly punished than the federal robbery statute); and *United States v. Big Crow*, 523 F.2d 955, 958 (8th Cir.1975), *cert. denied*, 424 U.S. 920, 96 S.Ct. 1126, 47 L.Ed.2d 327 (1976) (ACA inapplicable though the state statute prohibited assault resulting in great bodily harm and provided a stiffer penalty than the federal assault statute). Accordingly, we hold that the federal murder statute preempts the Louisiana first degree murder statute and because the precise act here, killing a human being, is punishable under the federal statute and because the nature of the crime "murder of a child" does not differ substantially from the nature and theory of murder in general. The government improperly invoked the ACA to charge the Lewises under the Louisiana statute. The indictment contains an infirmity in that it references La. Rev.Stat. § 14:30A(5). We must determine whether the convictions and sentences can survive in spite of this infirmity.

B. REMEDY REGARDING FLAWED ASSIMILATION

The infirmity discussed above is not fatal to the indictment in this case. We find the infirmity to be an apparent rather than a real defect. Accordingly, though we find error in the indictment, we will uphold the Lewises' convictions unless they establish reversible error on another ground. This court has previously adopted the maxim that "[w]here the government wrongfully secures a conviction

under a state statute pursuant to the Assimilative Crimes Act, rather than under the relevant federal statute, the appropriate remedy is not reversal of the conviction, but rather a vacating of the sentence and a remand to the district court for resentencing[,]" provided that the basic elements of the crime as defined in the federal statute were proven at trial and provided that no trial errors warrant reversal of the convictions. *See United States v. Olvera*, 488 F.2d 607, 608 (5th Cir.1973), *cert. denied*, 416 U.S. 917, 94 S.Ct. 1625, 40 L.Ed.2d 119 (1974) (citing *United States v. Chaussee*, 536 F.2d 637, 644 (7th Cir. 1976) (citing *United States v. Word*, 519 F.2d 612, 618 (8th Cir.1975)). *Compare United States v. Butler*, 541 F.2d 730, 737 (8th Cir.1976) (the court discussed the applicable remedy of remanding for sentencing, but instead vacated the convictions because the government did not prove at trial the interstate commerce nexus, which was not an element of the state crime).[9]

In *Olvera*, the government conceded on appeal that the federal statute was controlling rather than the ACA and the Texas statute. 488 F.2d at 608. This court held that the "sentence must be vacated and the cause remanded for entry of a new judgment imposing sentence under the federal statute." The Ninth Circuit took a similar position in *Hockenberry v. United States*, 422 F.2d 171, 174 (9th Cir.1970). In *Hockenberry*, although the government conceded that the existence of an applicable act of Congress precluded assimilation of the California statute through the ACA, the court refused to dismiss the indictment. The indictment stated a crime against the United States even though the language of the California statute differed from the applicable federal statute. 422 F.2d at 173-74. The court reasoned that rules 7(c) and 52(a) of the Federal Rules of Criminal Procedure instruct that:

[9] When discussing the conclusions reached in *Chaussee*, the district court below acknowledged the quote regarding remand. *United States v. Lewis*, 848 F.Supp. 692, 695 n. 3 (W.D.La.1995).

> "error in the citation of the statute or its omission shall not be ground for dismissal of the indictment * * * or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice" and . . . "any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

Id. at 174 (internal brackets omitted). After noting that the defendant did not allege prejudice or defects affecting substantial rights and then finding that the record would not support either claim, the court lacked jurisdiction to prosecute the defendant. The *Hockenberry* court affirmed the defendant's conviction but remanded the case for resentencing.[10]

Likewise, we find that remand for reindictment and retrial is not required under the circumstances of this case. The basic elements are the same for second degree murder under 18 U.S.C. § 1111(a) and first degree murder under La.Rev.Stat. § 14:30A(5). Both statutes require proof of specific intent.[11] and the killing of a human being. Re-

[10] "It is well settled [in the ACA context] that an incorrect statutory reference in an indictment does not require reversal where all of the essential elements of the correct statute are otherwise covered, but that any sentence imposed in excess of that allowed under the correct statute must be vacated and the case remanded for resentencing." *United States v. Walker*, 557 F.2d 741, 746-47 (10th Cir.1977). Several circuits that have wrestled with defective indictments containing erroneously assimilated state law have reached the same conclusion. *See, e.g., United States v. Hall*, 979 F.2d 320, 323 (3d Cir.1992); *United States v. Lavender*, 602 F.2d 639, 640-41 (4th Cir.1979); *United States v. Chaussee*, 536 F.2d 637, 644-45 (7th Cir.1976); *United States v. Word*, 519 F.2d 612, 618-19 (8th Cir.), *cert. denied*, 423 U.S. 934, 96 S.Ct. 290, 46 L.Ed.2d 265 (1975); *United States v. Patmore*, 475 F.2d 752, 753 (10th Cir. 1973); *Dunaway v. United States*, 170 F.2d 11, 12-13 (10th Cir. 1948).

[11] We reject Mrs. Lewis's arguments that the federal murder statute requires proof of "intent to kill." She says that because she and

garding intent, 18 U.S.C. § 1111 requires proof of "specific intent to inflict serious bodily injury," and La.Rev. Stat. § 14:30A(5) requires proof of "specific intent to inflict great bodily harm." The dissimilar phrasing does not destroy the compatibility existing between the statutes. This court has already acknowledged that the intent element under the federal murder statute is comparable to the intent required under the Louisiana murder statutes. *See United States v. Tolliver*, 61 F.3d 1189, 1221 (5th cir.1995), *vacated on other grounds, Sterling v. United States*, —— U.S. ——, 116 S.Ct. 900, 133 L.Ed.2d 834 (1996). In *Tolliver*, when analyzing a sentencing issue, the court agreed with the district court that the Louisiana second degree statute, under which the defendants were convicted, was most akin to the federal crime of first degree murder.

> [T]he language of the guidelines instructs the court to compare the conduct, not the titles of the statutes

her husband never intended to kill Jadasha they could not be convicted of murder under the federal statute. This circuit has indicated that malice aforethought may be inferred from circumstances which show a callous, wanton, or extremely indifferent disregard for human life. *United States v. Chagra*, 807 F.2d 398, 402 (5th Cir.1986), *cert. denied*, 484 U.S. 832, 108 S.Ct. 106, 98 L.Ed.2d 66 (1987) (after rejecting the defendant's argument that the jury instruction, which did not demand proof of an intent to kill but only demanded proof of reckless acts causing the death of another, was error, the court noted that the instruction reflected the correct definition of malice); *see also, United States v. Harrelson*, 766 F.2d 186, 189 n. 5 (5th Cir.), *cert. denied*, 474 U.S. 908, 106 S.Ct. 277, 88 L.Ed.2d 241 (1985); and *United States v. McRae*, 593 F.2d 700, 703 (5th Cir.), *cert. denied*, 444 U.S. 862, 100 S.Ct. 128, 62 L.Ed.2d 83 (1979). More importantly, this court has specifically found that malice aforethought is equivalent to an intent do serious bodily injury. *Lara v. Parole Comm'n*, 990 F.2d 839, 841 (5th Cir.1993) (explaining the three distinct mental states encompassed in malice aforethought: "(1) intent to kill; (2) *intent to do serious bodily injury*; and (3) extreme recklessness and wanton disregard for human life" [emphasis added]).

> cited. As pointed out by the district court, different states have different labels for the same crime.
>
> > [t]herefore, depending upon which state murder statute is charged as the underlying offense of "premeditated murder or killing with specific intent," inconsistent sentences for identical illegal conduct would be imposed in different states if the base offense level was computed merely by looking at the "label" of such statute and having that label be determinative of the most analogous federal offense, rather than looking at the actual substance of the underlying state statute to determine the most analogous federal offense.

The *Tolliver* court concluded that the district court had correctly compared the substance of the underlying offense and correctly found that the first degree murder was the most analogous federal offense. Though labeled somewhat differently, "intent to inflict serious bodily injury" and "intent to inflict great bodily harm" represent parallel intents for purposes of evaluating these murder statutes. Accordingly, the elements under the federal and Louisiana murder statutes are analogous enough for us to conclude that the two statutes share the same essential elements.

In the present case, the government proved the elements for federal murder at trial. The district judge instructed the jury as follows:

> in order to convict either of the defendants of First Degree Murder, you must find:
>
> 1. That said defendant killed Jadasha D. Lowery on or about December 20, 1993; and
>
> 2. That said defendant acted with specific intent to kill or inflict great bodily harm. . . .

The jury's finding that both Lewises were guilty of this crime indicates that the intent and death elements were

satisfied. Accordingly, the elements for second degree murder, which mirror the elements contained in the jury charge, were proven below.

Provided that we find below that the Lewises' convictions are not reversible due to trial error, remand for resentencing is not warranted in this case. Resentencing is only required where the district court has imposed a sentence that exceeded the maximum sentence that the defendant would have received if sentenced under the applicable federal statute. In *Hockenberry*, the court explained that resentencing was necessary because the indictment could not support the ten-year sentence Hockenbery received. 422 F.2d at 174. Though the maximum sentence under the California statute was ten years, the maximum sentence available under the federal statute was only five years. Accordingly, the court instructed the district court on remand to reduce the sentence to comport with the federal penalty.

In *United States v. Hall*, 979 F.2d 320, 323 (3d Cir. 1992), the Third Circuit refused to remand for sentencing because "the sentence imposed on Hall was not higher than that which could have been convicted under the CFR." The CFR provided punishment consisting of a fine not exceeding $500, or six months imprisonment, or both, plus costs. The district court sentenced Hall to 45 days imprisonment and a fine of $300. The *Hall* court found no prejudice and no need for remand.

Here, the Lewises did not receive a sentence exceeding the maximum sentence allowed under the federal murder statute. The United States Code makes second degree murder punishable by imprisonment "for any term of years or *for life*." 18 U.S.C. § 1111 (emphasis added). Mr. and Mrs. Lewis both received life sentences. Unlike Hockenberry, the Lewises' sentences are supported by their joint indictment. Therefore, we need to remand for resentencing.

C. CLAIMS OF TRIAL ERRORS.

Our conclusions regarding the defective, but not fatal, indictment and the appropriate remedy for the flawed assimilation do not end the discussion. We still must determine whether the convictions can stand in the face of the other trial errors alleged by the defendants. After a thorough review of the record, we find no reason to reverse the Lewises' convictions. We will, however, discuss the Lewises' specific contentions of error below.

1. *Sufficiency of the Evidence.*

Both Lewises claim that there was insufficient evidence to prove that they had specific intent to kill or inflict great bodily harm on Jadasha. Mr. Lewis claims that there is overwhelming evidence suggesting that Mrs. Lewis had a plausible motive (i.e., jeolousy) to harm Jadasha and that she delivered the murderous blows to Jadasha; whereas, the evidence merely places him on the premises on the day of the murder. Mr. Lewis lists several witnesses who testified as to Mrs. Lewis's jealousy and abuse of Jadasha. Only Mrs. Lewis and her two daughters testified that Mr. Lewis hit Jadasha. Not even they testified that he hit Jadasha on the head. Moreover, the pathologist testified that he had to dissect Jadasha's body to see the extent of the bruising, and that the visible marks cannot be characterized as "great bodily harm."

Similarly, Mrs. Lewis admits to disciplining Jadasha, but denies that the discipline resulted in significant injury. She points primarily to testimony of the pathologist in support of her insufficient evidence claim. He testified that (1) the hemorrhages and bruises on Jadasha's head would not have been visible through her scalp and hair, (2) the deep bruises evident on the pre-autopsy and autopsy photographs of Jadasha were not visible at the time she died and had to work their way to the surface of her skin, (3) the body bruises might not be visible if

Jadasha was wearing clothes, (4) there was no evidence that the brain hematomas were directly related to the contusions found on Jadasha's scalp, and (5) the contusions and deep hemorrhages were caused by objects like an adult's hand; one would not expect a fly swatter or ⅜" diameter switch [12] to inflict these injuries. Mrs. Lewis also argues that none of the many witnesses called by the government or the defendants testified that they saw Mrs. Lewis strike Jadasha or use unusual or excessively cruel discipline measures on her. She further asserts that "even though [Jadasha] died, that is not in and of itself murder."

The standard for reviewing the sufficiency of the government's evidence is whether a reasonable trier of fact could have found that the evidence established the appellant's guilt beyond a reasonable doubt. *United States v. Stedman*, 69 F.3d 737, 739 (5th Cir.1995); and *United States v. Ruggiero*, 56 F.3d 647, 654 (5th Cir.), *cert. denied*, —— U.S. ——, 116 S.Ct. 486, 133 L.Ed.2d 413 (1995). We must review the evidence in the light favorable to the guilty verdict, that is, in the light most favorable to the government. *See United States v. Tannehill*, 49 F.3d 1049, 1054 (5th Cir.), *cert. denied*, —— U.S. ——, 116 S.Ct. 167, 133 L.Ed.2d 109 (1995). Further, we must consider all reasonable inferences arising from the evidence in the light most favorable to the government. *Id.*

Under Revised Statute 14:30A(5), the government had to prove that the Lewises killed Jadasha with specific intent to kill or inflict great bodily harm upon a victim under the age of twelve. Further, the government had to satisfy its burden of proving that the Lewises were guilty beyond a reasonable doubt; proving only that the Lewises *could be guilty* is insufficient to satisfy this burden.

[12] A "switch" is a light branch from a tree or bush used to discipline by striking.

United States v. Sacerio, 952 F.2d 860, 863 (5th Cir. 1992). Because Jadasha's age and death are undisputed, we proceed to the issue of the defendants' intent.

We find that the record fully supports the defendants' convictions. Their arguments ignore the vast amount of circumstantial evidence which was sufficient to allow a jury to infer that they were guilty of murdering Jadasha. In the defendants' statements given contemporaneously with the investigation into Jadasha's death both admitted to beating Jadasha numerous times within the twenty-four hours preceding her death. Mr. Lewis shook Jadasha several times and hit her with his hand or a fly swatter, while Mrs. Lewis hit her with a fly swatter, coat hanger, and switches. Further, because they spent the day together, the Lewises were aware of the beatings administered by the other that day. A military police officer testified that soon after learning that Jadasha was dead Mr. Lewis told the military police officers "I shouldn't have done it; I shouldn't have spanked her like that." Other military police officers testified that Mrs. Lewis made spontaneous statements that "she only had to whip [Jadasha] three times that day" and "she shouldn't have hit the child. If the child would be okay, then she would not punish her again." In addition, both related a version of an incident in which Mr. Lewis was beating Jadasha, she ran in her room or was instructed to go to her room, and then Mrs. Lewis called her from the room, wherein Mr. Lewis beat Jadasha again. Further, during the ride to the correctional facility Mr. Lewis was overheard asking investigator McCormick how pleading guilty to a charge relating to homicide would affect his military career.

Testimony from a paramedic, emergency personnel, a pediatrician, and a forensic pathologist attested to outward signs that demonstrated the extent of Jadasha's injuries. Testimony indicates that flesh wounds on Jadasha "were still oozing blood" when she arrived in the emergency room. The paramedic describes a mark on

Jadasha's forehead, a swollen lip, blood matted in her hair, blood on the top of her left ear, skin missing from her left ear, and marks on her body from a fly swatter or a coat hanger. The injuries on her body were consistent with an adult's open hand, a fly swatter, a hanger, and a curtain rod.

The pediatrician's testimony corroborated the testimony of the paramedic and emergency room personnel. Additionally, he said that Jadasha's abdomen was tense, indicating the possibility of abdominal trauma. The cartilage appeared to be fractured in Jadasha's left ear. Jadasha had suffered multiple repeated trauma to her body. Moreover, the pediatrician agreed that the injuries qualified as "great serious injuries."

Similarly, the forensic pathologist's description of the crime scene showed that the blood of the slaughter remained in the house. Several blood drops appeared all over the floor of the living room and on the floor of Jadasha's room. Blood was found on pieces of a curtain rod found crumpled in the Lewises' garbage can. Dried blood spots were visible on the sofa, on the window curtail, on the closet doors in the hallway, in the master bedroom closet, and on walls. One blood spot on the wall looked like a child's smeared hand print. Blood appeared on articles of clothing and blankets. In addition to the blood spots, the pathologist found several pieces of broken twigs in Jadasha's room, two unusually thick and bulky fly swatters, which he said "didn't look like what you would think a fly swatter would look like." He also found a clump of hair that appeared to be pulled out of the scalp.

The forensic pathologist counted over two hundred injuries on Jadasha's body caused by non-accidental injury. He matched the shape of Jadasha's injuries with the weapons the Lewises admitted using to beat Jadasha. He also testified regarding the nature of the old and new wounds

covering her body. In great detail he described the raw sores, lacerations, and callouses evident on both sides of Jadasha's buttocks, which were caused from chronic, repetitive injuries. The pathologist testified that (with the exception of some areas on the buttocks, the left ear, and scars from a hot liquid burn) the injuries to Jadasha's body were inflicted within twenty-four hours of her death because there was "recent bleeding in the underlying tissue." So much blood was redirected into the tissues underlying the injuries that Jadasha's circulatory system was missing one-third to two-third of the blood normally found in the circulatory system. The pathologist explained that an adult's hand, rather than the twigs, coat hanger, or fly swatter, probably caused the deeper hemorrhages. He said the massive hemorrhaging could have eventually caused Jadasha's death; however, he said Jadasha died from cerebral edema (brain swelling), caused by a blow to her head. The pathologist conservatively counted nine head injuries, any one of which was sufficient to cause Jadasha's death. He said that the amount of force necessary to cause the brain to swell is equivalent to dropping a child on its head from a height higher than three freet onto an uncarpeted floor. Further, the pathologist discussed contusions on Jadasha's forehead, on both cheeks, and over the bridge on her nose as well as scratches and cuts in her face. He also said that several coat hanger type abrasions appeared in Jadasha's face.

Neighbors and friends of the Lewises also attested to the history of abuse to which Jadasha was subjected, primarily by Mrs. Lewis. For example, Amber Nantz, who visited the Lewises testified that she observed injuries on Jadasha on several occasions. When Mrs. Lewis explained in Jadasha's presence how a large black eye occurred, "Jadasha kind of had a funny expression on her fac[e], a funny look on her face that she didn't know what Debra was talking about." Mrs. Nantz also related that Mrs. Lewis withheld food from Jadasha for three days to teach

her a lesson, and during that time she would intentionally eat food in front of Jadasha to see if Jadasha would admit to her hunger. Numerous other witnesses corroborated the signs of injury and abuse inflicted on Jadasha. Another person witnessed Jadasha with a black eye. Several attested to seeing the burn on Jadasha's ear and hearing of the three days of starvation. Most indicated that Debra voluntarily spoke of disciplining Jadasha, and they consistently indicated that the Lewises said they disciplined Jadasha by spanking her with their hands or a fly swatter. A few remembered Debra stating that "if she didn't stop whipping Jadasha she would hurt her or kill her" and "she was going to let James whip [Jadasha because] [s]he wasn't going to go to jail for killing that child." One witness testified that when Mrs. Lewis discussed beating Jadasha, her demeanor demonstrated that Mrs. Lewis thought the disciplining was funny. She also said Mrs. Lewis told her Jadasha had sores on her when she came to live with the Lewises and it therefore was necessary to bathe her in bleach. Another witness testified that she saw Mrs. Lewis strike Jadasha and burst her lip. At least one witness reported the starvation incident to the sergeant, and a few suggested to the Lewises that they needed counseling.

After viewing the evidence in favor of the government, we find the record abundant with evidence to prove that the Lewises had specific intent to inflict great bodily harm upon Jadasha and that they aided and abetted each other in the beatings. There was sufficient evidence regarding the events of the day for the jury to conclude that the Lewises were aware that the other was beating Jadasha and that they assisted each other in some capacity in the beatings. Mr. and Mrs. Lewis both beat Jadasha repeatedly throughout the day of her death. There is no testimony that any other person contributed to the beatings Jadasha endured the day of her death. Without question because of the force accompanying their blows

and the numerous beatings administered with that amount of force, the Lewises intended to cause Jadasha serious bodily harm.

The Lewises claim that they could not have known the effect of their blows because the deep bruises did not surface until later. They also say that they could not have seen the bruises through her clothes. We find this reasoning implausible and disingenuous. First, there was blood visible on Jadasha, her clothes, the walls, floors, window curtain, and the instruments used to beat Jadasha. Some of Jadasha's injuries still oozed blood when she reached the emergency room. The jury could infer that a blow from an adult to a forty-two pound four-year-old with enough force to draw blood capable of leaving the trail described above comes with specific intent to inflict great bodily harm.

Second, Jadasha had several old injuries on her body, especially on the cheeks of her buttocks. The Lewises had proof that the force of their blows would produce injury to Jadasha. This proof did not deter their beatings; instead, they administered many more blows of equal or greater force. We find that the Lewises did not have to see the recently created bruises to know that their blows were in fact causing serious internal injuries. Further, testimony revealed that the body blows would have caused Jadasha's death if the head injuries had not killed her. The jury could conclude that non-accidental blows of this quantity and intensity on a forty-two pound four-year-old from an adult could only come with the specific intent to inflict bodily harm on the child.[15] Likewise, the jury could find that blows from an adult to the abdomen of a child of this age and size came with like intent.

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[15] We are convinced that the Lewises would not have sought medical treatment and would have treated the body bruises themselves with bleach and peroxide as they had treated Jadasha's injuries in the past.

Finally, the Lewises struck Jadasha on the head and caused her brain to swell. Testimony from the pathologist clarified the significance of this type of head injury. The jury reasonably could deduce that a non-accidental blow to a four-year-old's head with force greater than a three-foot fall can only come with specific intent to cause serious bodily harm.

We conclude that there was more than enough evidence for a jury to find beyond a reasonable doubt that Mr. and Mrs. Lewis possessed specific intent to inflict great bodily harm on Jadasha. We reject the Lewises' arguments that the evidence was insufficient; the evidence here allows more than an inference that the defendants beat Jadasha mercilessly and repeatedly throughout the day on her head and body, using far more force that would be acceptable to discipline a four-year-old child. Thus, the Lewises' convictions for first degree murder under Louisiana law could not be reversed on this ground.

2. *Admissibility of the Photographs.*

The Lewises argue that the prejudicial effect of the photographs outweighed their probative value. Additionally, Mr. Lewis asserts that the autopsy photos, which were unusually gruesome and inflammatory, were unfair because the dissections depicted the extent of the bruising, which he could not have known prior to the autopsy.

We review the admissibility of photographic evidence for abuse of discretion. *United States v. Follin*, 979 F.2d 369, 375 (5th Cir.1992). We find that the district court properly weighed the probative value against the prejudicial effect when evaluating the admissibility of the photographs. *See* Fed.R.Evid. 403. The court found the photos relevant to the issue of the defendants' intent and the issue regarding absence of accident. We agree that the photos are relevant for these reasons. Gruesome photographs are relevant when they establish an element of the crime

charged. *United States v. Bowers*, 660 F.2d 527 (5th Cir. Unit B Sept. 1981); *United States v. McRae*, 593 F.2d 700, 707 (5th Cir.), *cert. denied*, 444 U.S. 862, 100 S.Ct. 128, 62 L.Ed.2d 83 (1979); and *United States v. Kaiser*, 545 F.2d 467, 476 (5th Cir.1977). We also agree with the government that under the facts of this case the photos were relevant to counter claims that the Lewises' employed normal disciplinary measures. The extensive bruising divulges the excessive force behind the Lewises' supposedly disciplinary blows. The photos are the best means of conveying to the jury the force behind the blows.

Further, we find that the potential prejudice was consciously minimized here. The district court avoided duplication and limited the prejudicial effect of the photos by requiring the government to reduce the number of photos to be shown to the jury. Of the approximately 130 photos, the government entered only 16 into evidence. In another child abuse case resulting in death, we commented that the photos of the child's lacerated heart

> had the potential to inflame the jury, but we consider it no more inflammatory than photographs that portray this sort of death suffered by the victim in this or any other case where the circumstances of the death are at issue. *United States v. Kaiser*, 545 F.2d 467, 476 (5th Cir.1977). The photograph, here, was essential to the government's case if it was to meet its burden of showing that appellant brought cruel and excessive physical force to bear on her child.

Bowers, 660 F.2d at 529. Thus, the district court acted well within its discretion when allowing the government to present the photos to the jury.

3. *Admissibility of the Lewises' Statements.*

The Lewises argue that the district court erred by overruling their objections to the adequacy of the advice of

rights given to them when they gave statements to investigators. Mr. Lewis asserts that he was not informed that he had a right to a private attorney. Mrs. Lewis claims that she was not advised of her rights until six hours after her initial detention at the hospital, that because of her emotional state she would not comprehend the severity of the situation, that the length of time to give the statement demonstrates the presence of coercion, that she believed the statement had to be given before she could see her son and Jadasha's body, and that she failed to understand the warnings given.

The Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 1630-31, 16 L.Ed.2d 694 (1966) established the warnings that a defendant must receive in order for his statement to be admissible at trial. The defendant is free to waive the rights conveyed in the warnings if the waiver is done (1) voluntarily and (2) knowingly and intelligently. *United States v. Andrews*, 22 F.3d 1328, 1337 (5th Cir.), *cert. denied*, —— U.S. ——, 115 S.Ct. 346, 130 L.Ed.2d 302 (1994).

In the present case, the district court held a suppression hearing wherein he heard live testimony from investigators and Mrs. Lewis regarding the warnings given to the defendants. The testimony indicates that the Lewises each received a form containing the customary *Miranda* warnings. The district court found that the military form given to Mr. Lewis adequately apprised him of his rights and allowed him to knowingly waive his rights. Mrs. Lewis received the FBI Miranda warnings form, which she initialed. Additionally, the district court questioned Mrs. Lewis regarding her statements.[14] The court concluded that Mrs. Lewis understood that she was waiving her rights and voluntarily waived the rights after being adequately advised by an investigator. The district court

[14] Mrs. Lewis actually gave two statements. Mrs. Lewis asked to give a second statement so that she could correct inaccurate statements made in the first statement.

admitted the statements into evidence after making these determinations.

The district court saw the live testimony and was in a position to factor body language into its credibility determinations. Accordingly, with the exception of the voluntary issue, we must accept the district court's factual findings regarding the interrogations unless the findings are clearly erroneous. *United States v. Foy*, 28 F.3d 464, 474 (5th Cir.), *cert. denied*, —— U.S. ——, 115 S.Ct. 610, 130 L.Ed.2d 520 (1994). We cannot say that these findings are clearly erroneous based upon the record before us.

The issue of voluntariness is a legal question, 22 F.3d at 1340 n. 12. A waiver is voluntary when it is "the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Id.* at 1337. Nothing in the record demonstrates that the Lewises waived their rights because of intimidation, coercion, or deception. We cannot say that the district court erred in denying the Lewises' motions to suppress their statements.

4. *The Battered Woman's Syndrome Defense.*

Mrs. Lewis argues that she suffered from Battered Women's Syndrome which diminished her capacity to develop specific intent to kill or inflict great bodily harm on Jadasha or to aid and abet Mr. Lewis to do the same. We concluded above that the government presented sufficient evidence to allow the jury to find that Mrs. Lewis had specific intent to inflict great bodily harm on Jadasha. The jury heard and evaluated the testimony regarding Battered Women's Syndrome. The jury chose not to believe that the Syndrome affected her ability to develop the intent necessary to commit murder. We find no basis in the record to disturb the jury's credibility choices. *See United States v. Garcia*, 86 F.3d 394, 398 (5th Cir.1996) (noting that the appellate court must

accept the credibility choices supporting the verdict); and *United States v. Straach*, 987 F.2d 232, 237 (5th Cir. 1993) (noting that the appellate court cannot weigh and assess the credibility of the witnesses).

Based on our evaluations of the record, we find no merit to any of the Lewises' evidentiary claims of error. Therefore, we will not compel the government to waste time and resources reindicting the Lewises, duplicating the trial, presenting the same sufficient evidence, and proving the same elements where the jury has already spoken loudly, clearly, and correctly. The jury found the Lewises guilty and, under the circumstances of this case, a new trial would not change this.

CONCLUSION

For the foregoing reasons, we AFFIRM the convictions and sentences of James M. Lewis and Debra Faye Lewis for murder of Jadasha D. Lowery even though the indictment, erroneously charged them with first degree murder under La.Rev.Stat. § 14:30A(5) pursuant to the Assimilative Crimes Act rather than 18 U.S.C. § 1111.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(Title Omitted)

Appeal from the United States District Court
for the Western District of Louisiana, Lake Charles

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(September 16, 1996)

Before JOLLY, DUHE and STEWART, Circuit Judges.

PER CURIAM:

(✔) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

/s/ Paul E. Stewart
United States Circuit Judge

SUPREME COURT OF THE UNITED STATES

No. 96-7151

DEBRA FAYE LEWIS,
Petitioner

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

May 12, 1997

ORDER LIST

TUESDAY, MAY 13, 1997

ORDER IN PENDING CASE

96-7151 LEWIS, DEBRA F. v. UNITED STATES

The order granting the petition for a writ of certiorari is amended to read:

The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted limited to the following question: Whether petitioner was properly charged and convicted for the murder of her four-year old stepdaughter under the Assimilative Crimes Act, 18 U.S.C. § 13, and the Louisiana child murder statute, 14 La. Rev. Stat. Ann. § 30A(5), and if not, whether the sentence was proper?